(1) Supreme Court, U.S.
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No.

# IN THE
# Supreme Court of the United States

FRANK J. MARCONE
*Petitioner*

v.

THE THIRD CIRCUIT COURT OF APPEALS
Chief Judge EDWARD R. BECKER
Judges MORTON I. GREENBERG,
CAROL LOS MANSMANN, THEODORE A. McKEE,
DOLORES K. SLOVITER, ANTHONY J. SCIRICA,
RICHARD L. NYGAARD, SAMUEL A. ALITO,Jr.,
JANE R. ROTH, MARY ANN TRUMP BARRY
Circuit Judges

On Petition For Writ of Mandamus/Prohibition
To The Third Circuit Court of Appeals

## PETITION FOR WRIT OF MANDAMUS/PROHIBITION

Frank J. Marcone
*Pro se Petitioner*
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(610) 565 3241

230PP

## QUESTIONS PRESENTED FOR REVIEW

Does 28 U.S.C.§ 455 (a), WHICH REQUIRES THAT ANY JUDGE SHALL DISQUALIFY HIMSELF IN ANY PROCEEDING IN WHICH HIS PARTIALITY MAY REASONABLY BE QUESTIONED, REQUIRE THE THIRD CIRCUIT BENCH TO RECUSE WHEN THE BENCH HAD VOTED AGAINST THE PETITIONER IN A DISCIPLINARY ACTION ADVOCATED BY A MEMBER OF THE BENCH.

DOES 28. U.S.C. §455(a) REQUIRE A SPECIFIC JUDGE TO RECUSE WHEN HIS ACTIONS IN RELATION TO A CASE HAVE EVIDENCED CLEAR BIAS AND PARTIALITY AND PREJUDGMENT.

DOES 28 U.S.C. §455(a) REQUIRE THE UNITED STATES SUPREME COURT TO VACATE THE JUDGMENT AND TO REFER THIS CASE TO ANOTHER CIRCUIT FOR DISPOSITION

## PARTIES TO THE PROCEEDING

The identity of the Persons involved in this Petition are the following:

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   Upper Providence, Pennsylvania 19063

2. Honorable Edward R. Becker, Chief Judge
   Third Circuit Court of Appeals
   Room 19613 U.S. Courthouse
   601 Market Street
   Philadelphia, Pennsylvania 19106-1792
   (215) 597 9642

3. Honorable Morton I, Greenberg, Circuit Judge
   Third CircuitCourt of Appeals
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   U.S. Courthouse, Trenton, New Jersey 08608
   (609) 989 0436

4. Honorable Carol Los Mansmann, Circuit Judge
   1036 U.S. Post Office and Courthouse
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5. Honorable Anthony J. Scirica, Circuit Judge
   22614 U.S. Courthouse
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6. Honorable Richard L. Nygaard, Circuit Judge
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7. Honorable Samuel A. Alito, Jr., Circuit Judge
Rm 357 U.S. Post Office & Courthouse
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8.Honorable Jane E. Roth, Circuit Judge
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9. Honorable Theodore A. McKee, Circuit Judge
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INDEX TO THE PETITION FOR
WRITS OF MANDAMUS, PROHIBITION
VACATING JUDGMENT

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QUESTIONS PRESENTED FOR REVIEW..... Page i

TABLE OF CITATIONS.....Page viii,ix

TABLE OF AUTHORITIES.....Page x

OPINION BELOW.....Page 1

JURISDICTION.....Page 1

FEDERAL STATUTE INVOLVED.....Page 1

STATEMENT OF THE CASE.....Page 2

FACTS OF THE CASE..... Page 3

REASONS FOR GRANTING THE WRITS.....Page 20

CONCLUSION .....Page 29

## INDEX TO APPENDIX

ORDER Granting Recusal of the Bench of the United States Federal District Court for the Eastern District of Pennsylvania, December 21, 1998.....page 1

Order of United States Federal District Court for the Eastern District of Pennsylvania Excluding time after Recusal , December 22,1998.....page 2

Motion by Petitioner requesting Recusal of the Entire Bench of the United States Federal District Court for the Eastern District of Pennsylvania...page 3

Memorandum of Law Supporting Motion to Recuse...page 4-6

Certificate of Service.....page 7

Judgement of the Third Circuit Ct. January 11, 2000....page 8

Opinion of the Third Circuit Ct., January 11, 2000....page9-15

Response to Rule to Show Cause (89-8079).....page 16-17

Docket Entries, Case #99-1842.....page 32-39

Letter, December 1, 1999.(Notice Denial Oral Arg.).....page 40

Docket Entries, Case #98-1079.....page 41-43

Motion for Stay of Proceedings, Third Circuit.....page 44-47

Transcript, February 19, 1999 (McKelvie, J.).....page 48-60

Transcript, Argument of Counsel.....page 61-63

Motion to Stay Proceedings: U.S.Supreme Ct.....page 64-71

Report and Recommendation:September 7, 1999....page72-78

Letter, Robert Greenbaum, Esquire to C.J. Becker...page 79-80

Order of the Eastern District Court, May 12, 1998,
Reinstating Petitioner.....page 81-82

Exceptions to Report and Recommendation.....page 83-106

C. J. Becker, Order of Suspension.,
November 26, 1999.....page 107-108

Motion to Recuse the Third Circuit.....page 109-119

Brief in Support of Motion to Recuse.....page 120-128

Affidavit of Charles Johns, Penna. Supreme Ct.....page 129

Affidavit of Seth Rosner, Esquire.....page 130-133

Dissent of Judge Stewart Dalzell,,#1.....page 134-140

Dissent of Judge Stewart Dalzell, #2.....page 141-143

Letter from Clerk of Third Circuit, 1990,.....page 143
(Requesting notice when "completed")

Letter Hon. Dominic Jerome, ret., .....page 144-145

Letter Hon. Joseph T. Labrum, ret.,.....page 146-147

Letter Hon. Melvin Levy, ret.,.....page 148-149

Order Denying Stay in Third Circuit
(Greenberg, J.).....page 150

Rule 10, Third Circuit .....page 151

Order January 13, 2000.(Greenberg, J.).....page 152

Order January 13, 2000. (Greenberg, J.).....page 153

Motion for Appeal Bail and Expedited Appeal.....page 154-171

Answer to Governments Response to Motion
for Appeal Bail and Expedited Appeal.....172 -188

TABLE OF CITATIONS AND AUTHORITIES

*Antar, in re*, 71 F.3d 97 (3rd Cir.1995).....page 22

*Branzburg v. Hayes*, 408 U.S. 605, 686-87,
92 S.Ct. 2646, 2569, 33 L.Ed. 6265 (1972).....page 19

*Government of Virgin Islands v. Allen*. 251 F. Supp.
479 (D.C. Virgin Islands 1966).....page 17

*Haines v. Liggett Group Inc.*,975 F.2d 81, 98
(3rd Cir.1992).....page 22

*Hall v. Small Business Admin.*, 695 F. 2d 175, 179,
(CA 5 1983).....page 28

*Jaffe v. Redmond*, 116 S.Ct.1923,
135 L.Ed.337, 44 Fed R. Evid Serv.1 (1996).....page 18, 19

*Liljeberg v. Health Services Acquisition Corp.*
486 U.S. at 860, 108 S.Ct. At 2203.....page 28

*Liteky v. United States*, 510 U.S. 540,
114 S.Ct.1147
(1994).....21,22,26,27,29

*Massachusetts Sch of law at Andover, Inc., v. America Bar Ass'n*,
107 F. 3d 1026, 1043, (3rd Cir.1997).....page 20

*Offutt v. United States*, 348 U.S.11, 14,
75 S.Ct.11, 13, 99 L.Ed.11 (1954).....page 21

*Prudential Ins. Co. of America Sales Practices Litigation, In re.*,
148 F.3d 283 (3rd Cir.1998).....page 22

*United States v. Antar*, 53 F.3d 568 (3rd Cir.1995).....page 22

*United States v. Bertoli*, 40 F.3d 1384, 1412 (3rd Cir.1994)..22

*United States v. Breslin*, 916 F. Supp. 438
(E.D.Pa. 1996).....page 18

*United States v. Calandra*, 414 U.S. 338, 94 S.Ct.613, 617,
38 L.Ed.2d 561 (1974).....page 19

*United States v. Chantal*, 902 R.2d 1018, 1023
(CA1 1990).....page28

*United States v. Miller*, 753 F.2d 19
(3rd Cir. 1985).....page 19

*United States v. Palermo*, 259 F.2d 872
(3rd Cir. 1956).....page 17

*United States v. Taylor*, 798 F.2d 1337
(10th Cir.1986).....page 18

*Village of Monroeville*, 409 U.S.57,60,
93 S.Ct.80, 83, 34 L.Ed.2d 267 (1972).....page 21

TABLE OF AUTHORITIES

FEDERAL RULES OF APPELLATE PROCEDURE,
RULE 34.....page 20

28 U.S.C. § 455 (a).....page 1,20,21,29

28 U.S.C. § 455 (b) (1).....page 21

28 U.S.C. § 1651 .....page 3

THIRD CIRCUIT LOCAL RULE, CHAPTER 1.
BRIEFS.....page 20

THIRD CIRCUIT LOCAL RULE 4(2).....page 7

THIRD CIRCUIT LOCAL RULE
OF ATTORNEY DISCIPLINE, RULE 3.1.....page 16

THIRD CIRCUIT LOCAL RULE
OF ATTORNEY DISCIPLINE, RULE 7.....page 10

THIRD CIRCUIT LOCAL RULE
OF ATTORNEY DISCIPLINE, RULE 7.2.....page 16

THIRD CIRCUIT LOCAL RULE
OF ATTORNEY DISCIPLINE, RULE 10.....page 8

THIRD CIRCUIT LOCAL RULE
OF ATTORNEY DISCIPLINE, RULE 10.3.....Page 18

THIRD CIRCUIT LOCAL RULE,
12(6)..... ....Page 20

## OPINION BELOW

This Petition for Writ of Mandamus, a Writ of Prohibition, a Prayer to Vacate the Judgment and Remand to another Circuit results from a refusal by the Third Circuit Court of Appeals to Recuse and more specifically, the refusal by Judge Morton I. Greenberg, to recuse or be prohibited from participating in the Merits Decision in this case.

Procedurally, this Petition arises from a January 11, 2000 Judgment of the Third Circuit Court of Appeals which affirmed the decision of the United States District Court for the "Eastern District of Pennsylvania".[1](Appendix p-8)

## JURISDICTION

The Third Circuit affirmed a judgment of conviction for three counts of late filed tax returns for 1990 -1992 and a sentence imposed on October 12, 1999, of four months incarceration, four months of house arrest, eight months of special probation; no fine nor restitution. The Petitioner files this series of Petitions for relief pursuant to Rule 20 of the Rules of the United States Supreme Court which is authorized by *28 U.S.C. § 1651(a).*[2]

## FEDERAL STATUTE INVOLVED

Title *28 U.S.C. §455(a)* provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

## STATEMENT OF THE CASE

The Petitioner seeks relief from a Judgment entered by a Judge who was compelled to recuse.

The Third Circuit Court of Appeals Bench voted to suspend the Petitioner from the Bar of the Court on November

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The entire Bench for the Eastern District Court recused. The case was assigned to the Federal District Court for the District of Delaware.

26, 1999. (App. p-107) On December 1, 1999, Judge Morton I. Greenberg, who personally initiated and advocated the suspension was assigned the appeal taken from a verdict in this criminal case. The Judge prohibited argument and filed an Opinion affirming the conviction before all the Briefs and Appendices were filed. (App. p-9)

The Petitioner had filed a Motion requesting recusal of the entire bench (App. P-109) and specifically, Judge Greenberg.

The Motion was denied.

The Petitioner requested a Stay from the United States Supreme Court prior to the Judgment and Opinion being filed. (App p.-64) That Petition was denied. The Petitioner now Petitions for a Writ of Mandamus, for recusal of the Third Circuit and more specifically of Judge Greenberg; a Writ Vacating the Judgement and a Writ of Prohibition, prohibiting the Third Circuit from further involvement in the Appeal. The Petitioner requests the issues be referred to another Circuit.

To satisfy the requirement that the Petitioner show the issuance of the Writs will aid in the appellate jurisdiction of the Court and that there is no other Court where relief may be sought, the Petitioner asserts (1.), The error complained of occurred in the Third Circuit Court of Appeals and This Court is the only Court which has appellate jurisdiction.(2.) The specific violation or error complained of is that the judge who affirmed the conviction has manifested his individual bias, prejudice and prejudgment requiring This Court to Vacate the Judgment and to refer to another Circuit for a fair and unbiased decision on the issues.(3.) The entire bench of the Eastern District Court, five months earlier had voted to reinstate the Petitioner to practice and then recused. Judge Greenberg, filed a disciplinary charge against the Petitioner, became the advocate, personally demanding the Petitioner be suspended from practice. The Petitioner was not charged with a violation of a disciplinary rule. Judge Greenberg personally entered Orders which denied due process, authored a Report and Recommendation demanding the Petitioner be given an unprecedented suspension; presented his Report and Recommendation to the Third Circuit Court of Appeals Bench personally and was successful in achieving a vote against the Petitioner. He has caused the Petitioner to be suspended from

practice for four (4) years, beginning on November 26, 2000.

Judge Greenberg ignored the fact his actions in the disciplinary case required recusal in the tax case and then personally took control of the appeal in the tax case, denying the Petitioner argument before the Briefs were filed. (Docket entries -App. pp.-32-39)

. Further, the Opinion completely ignored any of the issues which had been extensively briefed and which mandated a reversal. Only three pages were directed to the issues which were summarily dismissed. The remaining pages attempted to explain why a recusal was not granted. (App. pp. 9-15)

## FACTS OF THE CASE

The facts requiring the requested relief arise from the intertwining of two separate actions presently before the Third Circuit Court of Appeals.

In an effort to clarify the facts, the Petitioner will refer to one matter as the "disciplinary" ( Third Circuit Court of Appeals: 89-8079 Misc.) case and the second matter, which is the one under which the current relief is being sought, as the "tax" case. ( Third Circuit Court of Appeals: 99-1842)

The Petitioner is age 64 and has been a trial lawyer in Pennsylvania and other jurisdictions since 1963. In 1986, after a seven week anti-trust case in the Federal District Court in which he was successful lead counsel, he suffered an illness which he believed was from over-exhaustion. His major symptom was memory loss. In early April, 1986, the Petitioner's condition became critical and he withdrew from practice by notifying the Courts sought medical treatment.

During the illness a claim was made that he had procured a bail refund which been assigned to the Petitioner by a Court approved Power of Attorney which was signed and notarized by the claimant. Unable to recall all the facts involved in the acquisition of the fund, the Petitioner surrendered the $2,000 to the claimant, his client's relative. Pennsylvania Disciplinary counsel discovered the check had come from the Petitioner's personal account and charged the Petitioner with commingling. The Petitioner was unable to defend himself since he could not recall the specifics of the assignment.

On October 11, 1989, the Petitioner was suspended for

four (4) years by the Pennsylvania Supreme Court.

In the interim, treatment and assistance from other lawyers revealed the claim made for the $2,000 was false and the fund was part of the Petitioner's fee.

On July 19, 1990, the Pennsylvania Supreme Court Vacated the suspension, remanding the case to the Disciplinary Board with directions to take "additional testimony".

The Petitioner presented evidence which convinced the Hearing Committee the complainant had lied and the fund was part of the fee in the criminal case.

In the period between October 11, 1989 and July 19, 1990, the Petitioner was "reciprocally" suspended by both the Eastern District Court and the Third Circuit Court of Appeals.

Judge Morton I. Greenberg of the Third Circuit Court of Appeals was a member of the Standing Committee on Attorney Discipline in 1989.[3]and on March 7, 1990, he entered an Order directing: "*...that Court will not re-examine Findings of Supreme Court of Pennsylvania as to violations as long as Supreme Court of PA adheres to determination.*"[4] (App. p-20)

The Rules of Attorney Discipline in the Third Circuit provide The Court must examine the findings if the attorney contests the imposition of reciprocal discipline. The specific provision of the Rules are found at Rule 10, entitled "Contested Proceedings" and are in the Appendix at page 151.

The Petitioner had responded to the Rule to Show Cause, asserting the fund was his fee. (App. p-16-17)

In the notice giving the Hearing date, of May 30, 1990, Judge Greenberg again informed the Petitioner and his counsel that: *"Further ordered, at hearing, Court will not reexamine finding of Supreme Court of Pa".*(App. p.-21) *(Docket entries; March 29, 1990.)*

At the hearing, Judge Greenberg refused to permit testimony from witnesses who were present in the Hearing

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3 Judge Greenberg remains a member of that Panel today. The Rules of the Third Circuit provide for rotation of members of the Panel on a three year staggered basis.(LAR Rule 4(2))

4 The Petitioner has attached the entire Docket for case 89-8079 as part of the Appendix to this Petition.

Room.

On June 8, 1990, after the Hearing, Judge Greenberg recommended Petitioner be suspended for four (4) years beginning on October 11, 1989. That suspension was for four (4) years or earlier if reinstated to the Pennsylvania Supreme Court. (App. p. 23) No Exceptions were filed.

On July 19, 1990, when the Pennsylvania Supreme Court entered the Order which vacated the suspension, the Petitioner filed for reinstatement in both the Eastern District Court and the Third Circuit Court of Appeals.

On August 10, 1990, the Clerk of the Third Circuit Court of Appeals informed him by letter that Judge Greenberg's Report and Recommendation had not been acted upon and; *"Please advise the undersigned promptly when the Pennsylvania proceedings are completed."* (App. p.143)

On July 5, 1995, the Pennsylvania Supreme Court reinstated the October 11, 1989 suspension in a split decision with no Opinion. The Hearing Committee concluded the $2,000 was a part of the fee. They also concluded the complainant lied.

The disciplinary action in Pennsylvania is complex and is summarized by stating that the "innocence" of the Petitioner was proven and was then ignored when the Disciplinary Board member concluded that the Petitioner's counsel had not presented "after discovered evidence".[5]

The Petitioner filed Motions for Reconsideration of the July 5, 1995 Order with the Pennsylvania Supreme Court and initiated a "King's Bench" effort to seek reconsideration. Those efforts continued long into 1996 and therefore, the "proceedings in Pennsylvania" were not "completed" until at least August of 1996. They have been renewed as early as April, 1997 and continue on, delayed only by this conviction.

In 1995, *Local Rule 7 of the Third Circuit* which had been adopted in 1993 stated:

"1. When a member of the bar of this Court is

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The Pennsylvania Supreme Court was in an upheaval. Justice Larson had just been convicted of a drug crime and had made charges against the other Justices. He had been impeached and the attorney who represented the Petitioner also had represented Justice Larson.

> suspended...by another court...the suspension for the same period as imposed in the other court...is immediately and automatically effective in this Court. Rule 3.1: The identical discipline imposed by another court is presumed appropriate for discipline imposed as a result of that other court's suspension...of an attorney."

Notice of the July 5, 1995 suspension was immediately certified to the Clerk of the Third Circuit by the Clerk of the Pennsylvania Supreme Court and a copy of the Certification of Notice is attached as a part of the Appendix. (App. p.-129) The American Bar Association reporting service sent Notice of the Suspension. (See Aff'd of R. Greenbaum, Esq.,App. p.-91)

The Rules of the Eastern District Court do not provide for an "automatic and independent" suspension. The Petitioner requested the underlying proof of innocence be examined. A hearing was held in the Eastern District Court before Judges Bartle, Brody and Dalzell.

Judge Padova, who was a member of the Standing Committee on Attorney Discipline recused from involvement since just like Judge Greenberg, in this case, he had participated as a member of the Disciplinary Board in Pennsylvania in 1989 and had authored the Report recommending the original suspension. (Eight years earlier and under different findings.)

That recusal was sua sponte and resulted from his adherence to the Federal Recusal Statute, observing any involvement gave an appearance of bias or prejudice.

Judge Greenberg's involvement in this case was more current and direct. Judge Greenberg initiated the suspension effort and aside from writing the Report and Recommendation, he also personally participated in the discussions and urged the vote on his recommendation of a suspension. That vote occurred a mere month before he also wrote the Opinion affirming the lower court conviction. The precedence set by Judge Padova is evidence of an appearance of bias or prejudice requiring recusal.

Further, the Eastern District Court voted in favor of readmitting the Petitioner to practice before that Court. The vote was on May 7, 1998 and the reinstatement went into effect on September 28, 1998. (App. p.-81-82) The Petitioner and the

Government requested the Eastern District Judges to recuse in this case due to a possible appearance of bias or partiality. (App, p.–3) On December 21, 1999, the entire Bench of the Eastern District granted the request for recusal (App. p.-1)and Chief Judge Edward R. Becker of the Third Circuit Court of Appeals referred the case to the Delaware District Court and specifically assigned Judge Roderick R. McKelvie to hear the non-jury trial.

The Petitioner asserts the recusals of both Judge Padova and then all the Judges in the Eastern District Court set precedence and required the recusal of the Third Circuit and more particularly, Judge Greenberg.

At the Hearing before the Eastern District Court Panel in 1995, the Petitioner presented evidence of his innocence and an affirmation of his good character, professionalism and reputation for honesty. Among his witnesses were the Speaker of the Pennsylvania House of Representatives, the ex-First Assistant United States Attorney for the Eastern District of Pennsylvania and the founder of the Pennsylvania Association of Criminal Defense Lawyers. (See footnote in Dalzell Dissent -App. p-134)

In a two to one decision, the Eastern District Court panel decided they were compelled to follow the Pennsylvania Supreme Court simply on a comity issue. Judge Dalzell wrote a dissent which is made part of this record in the Appendix.(App. p. 134-143)

An appeal was taken to the Third Circuit in February, 1996 and attached to the Appendix to that Appeal was an actual copy of the Order of Suspension imposed by the Pennsylvania Supreme Court in July, 1995, giving notice for the third time.

Judge Arlen Adams was retained to represent the Eastern District Court. Argument on the issues was permitted before a Panel which did not include Judge Greenberg. Judge Adams has affirmed [6]that the argument was clearly on the issue of the July,1995 suspension. The Third Circuit panel chose to affirm the decision of the majority in the Eastern District. One of the

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A copy of Judge Adam's affirmation which was part of the Exceptions to the Report and Recommendation filed by Judge Greenberg is attached as part of the Petition Appendix.

panel members at argument referred to the suspension as "outrageous".

Judge Greenberg has made an issue of notice that the Third Circuit was not independently notified by the Petitioner. Judge Greenberg has personally taken offense at the fact the Petitioner had forgotten what appeared to be a request, rather than a Court "Order" in the letter sent him by the Clerk in August, 1990 and had not separately sent a notice of his suspension to the Third Circuit. The 1993 Rule change imposed an immediate suspension without need for an Order. The Petitioner followed the Rule and withdrew from practice.

The Petitioner believes this perceived "slight" on the part of Judge Greenberg has initiated an animosity which has now resulted in the affirmation of a criminal conviction which should have been reversed. It created the "appearance" of bias.

In April, 1997, after a ten year search, the Petitioner located the client in the 1986 case. He had disappeared after testifying against him in 1987 and was found living with his father, a retired Pennsylvania Judge, in Key Largo, Florida. The Petitioner procured a statement from the client verifying the $2,000 was part of the Petitioner's fee.

On October 28, 1997, he testified before the Eastern District panel and once again the panel divided. An appeal was again taken to the Third Circuit.

Once again, Judge Dalzell wrote a dissent to the decision and that dissent is in the Appendix at pages 141-142.

The second appeal before the Third Circuit was assigned to Judge Greenberg who immediately denied argument and informed the Petitioner the issues would be "submitted". Judge Greenberg personally wrote an Opinion denying relief. That Opinion was in case number 98-1079 and the Opinion was filed on July 29, 1998. Docket entries for that case are attached.(App pp. 41-43)

Thereafter, the Petitioner filed for reinstatement in the Eastern District Court and presented evidence of excellent character and professional reputation by almost 100 members of the Bar, including retired Judges; the Speaker of the Pennsylvania House of Representatives; Presidents of the Bar Associations, District Attorneys, the past First Assistant United States Attorney, members of his community, including the Chief

of Police in his town. Two retired judges stated they were aware of the facts of the discipline case and it was a "miscarriage of justice". [7] (App. pp. 144-149)

On May 28, 1998, Chief Judge Cahn of the Eastern District Court signed an Order readmitting the Petitioner to practice on September 28, 1998, the day the four year suspension terminated. (App. pp. 81-82) Eight days later the Petitioner was indicted in this case even though the tax returns were filed years earlier. The Sentencing Guidelines state this prosecution rarely is pursued unless large amount of taxes are owed. The Petitioner owed no taxes for those years and when he attempted to acquire information which might lead to a defense of selective prosecution, he was denied access to the requested information.

The Petitioner had appealed a lower court ruling in *Frank J. Marcone v. Philadelphia Marine Trade Center, 98-2021*. Judge Greenberg once again sat on that panel and immediately denied the Petitioner argument. On July 12, 1999, the issues were submitted and on July 15, 1999, Judge Greenberg filed a non-published Memorandum Opinion which imposed over $4,000 in costs against the Petitioner personally.

On August 12, 1998, Judge Greenberg personally initiated the disciplinary action against the Petitioner by "resurrecting" the case captioned In the Matter of Frank J. Marcone, An Attorney at Law, No. 89-8079. On that date, Judge Greenberg sua sponte directed the following:

> "...that Frank J. Marcone must show cause in writing, within 30 days, why he should not be suspended from the bar of this court for a period of four years, commencing upon the date of the date of the order of suspension of this court and until such time as he is reinstated to the practice of law by the Supreme Court of Pennsylvania, <u>whichever is later, and until further order of this court.</u> It is further Ordered that Frank J. Marcone complete and return to the Clerk of this Court,

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7 A copy of the Order Reinstating the Petitioner in the Eastern District Court is made a part of the Appendix to this Petition as well as two letters from retired judges attesting to the "miscarriage".

> within 30 days, a declaration of the names and addresses of the other bars to which he is admitted using the form supplied by the Clerk;"

(Emphasis provided.) (*Docket entry of August 12, 1998,*) which is made part of the Appendix to this Petition at page 25..

The requirement of reporting the other courts to whom the lawyer is a member is not required until a suspension or disbarment occurs. Judge Greenberg's directive is another instance of an appearance of advocacy and prejudgment.

On June 4, 1999, prior to the entry of a judgement of conviction in the tax case, Judge Greenberg caused a third Rule to Show Cause upon the Petitioner as follows:

> " directing the Petitioner to show cause... why he should not be "subject to the presumed disbarment... *the Court's Attorney Disciplinary Committee may summarily suspend Mr. Marcone privilege (sic) to practice before this Court. Copies of the District Court's Finding of Guilt and Revised Finding of Guilt are attached to this Order."*[8]

(App. p.27)The Petitioner responded noting that a judgment of conviction must precede a summary suspension and Judge Sloviter responded affirming the Petitioner was correct.

Judge Greenberg had to personally procure a copy of the Findings of Guilt and personally file them since there was no appeal in process at that time and the documents were in the District Court file. That is more than an "appearance" of bias.

A reasonable man could conclude that evidenced an individual act of bias, prejudice and prejudgment on the part of Judge Greenberg. The conclusion that the verdict was sufficient to warrant disbarment is a clear prejudgment of the issues in this case and alone would have required recusal under the Statute.

The Petitioner hired Robert Greenbaum, Esquire of Philadelphia who prepared Exceptions to the Report and Recommendations of Judges Greenberg.(App. pp. 83-106) Prior

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*Research indicates the discipline resulting from a conviction for late filed tax returns is either a public censure or a three month suspension from practice. There have been no disbarments for this offense in Pennsylvania Courts or in Federal Courts in Pennsylvania.*

to filing those Exceptions, Mr. Greenbaum, wrote directly to Chief Judge Edward R. Becker on the Third Circuit and stated in part:

> "October 18, 1999...However, *in light of the pending appeal in the IRS matter we respectfully request that the Court hold the disciplinary matter in abeyance and not consider the Report and Recommendation and Exceptions until resolution*
> *of the appeal, so that the members of the Court will not be considering the appeal at the same time as the disciplinary matter, which might otherwise require recusal. In addition, we respectfully request that the members of the Standing Committee not be assigned to hear the appeal in the tax matter."* (Appendix pp. 79-80)

The Exceptions to the Report and Recommendation contain an "Affirmation of Seth Rosner, Esquire, a member of the Board of Governors of the American Bar Association."

Mr. Rosner has served as a member of the National Study and Action Plan Regarding Lawyer Conduct and Professionalism of the Conference of Chief Justices and has almost forty (40) years of cumulative service on ethics, professionalism and professional responsibility committees of the ABA, the New York State Bar Association and the Association of the Bar of the City of New York. He is a founder and a past President of the Association of Professional Responsibility Lawyers.

He stated he had become familiar with the Report and Recommendation of Judges Greenberg, Sloviter and Cowen.. He characterized the Recommendation which originated with Judge Greenberg as "dramatically more severe" than the appropriate reciprocal suspension. [9]

His comments which are contained in the attached Appendix in full at pages.130-133 and in part state:

> "9. The recommendation of the Committee appears to me to run counter to the intent and purpose of the rule of reciprocity. It has the practical effect of doubling the

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9 A full copy of the Exceptions to the Report and Recommendation of Judge Greenberg are made a part of the Appendix to this Petition.

> Pennsylvania sanction from four years to eight years. This is an incongruous result for a sanction based on the provisions permitting reciprocity...
> 10. I am unaware of instances of similar incongruity...
> 11. Other Rules of the Circuit certainly permit an independent analysis of the facts, but the Committee did not follow that course of action...
> 14. The rules contemplate circumstances where the federal court may want to impose no sanction, a less restrictive penalty or a more severe discipline. However this divergence only functions appropriately if there is independence from te state bar admission and disciplinary process. The recommendation is contrary to this very independence."

The request to withhold presentation of the discipline case to the entire Bench was ignored as was the suggestion that the Panel members be restricted from hearing the merits of the appeal in the "tax" case.

On November 26, 1999, Chief Judge Edward R. Becker signed an Order in 89-8079 which is fully reproduced in the Appendix at pages 107-108. That Order stated Judges Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee and Barry had Adopted the Report and Recommendation of Judge Greenberg, suspending the Petitioner for four (4) years beginning on November 26, 1999 or until he is readmitted to the Pennsylvania Supreme Court, whichever is later.

Chief Judge Becker noted his dissent.

When the Petitioner filed the Appeal in this case, he had been denied Appeal Bail by Judge McKelvie who stated he determined the Petitioner had not raised "substantial issues".

The Petitioner requested Appeal Bail and an Expedited Appeal from the Third Circuit. A copy of that Motion is made part of the Appendix to this Petition at pages 154-183. The issue of Appeal Bail was submitted to a Panel of Judges consisting of Judges Alito, Nygaard and Senior Judge Garth.

On November 4, 1999, before the vote to suspend the Petitioner from practice, that panel found the issues were substantial and pursuant to the standards demanded by the Bail Reform Act, decided the issues presented by the Petitioner were likely to result in a reversal of an order for a new trial. *United*

*States v. Miller*, 753 F.2d 19, (3rd Cir. 1985) The Panel Granted both an Expedited Appeal as well as Appeal Bail.

On December 1, 1999, before any Briefs were filed of Record, the Petitioner' Attorney was notified his appeal in the "tax"case had been assigned to a Panel including Judge Greenberg. The Petitioner's attorney was also notified no argument would be permitted and the case would be submitted on Briefs on December 16, 1999, virtually ignoring precedence set by the Decision to Grant Appeal Bail.

The Rules of the Third Circuit Court of Appeals related to denying argument are as follows:

*"Federal Rules of Appellate Procedure: Rule 34.* Oral Argument

> (1) In General; Local Rules. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. ...
>
> Oral argument will be allowed unless
>
> (1) the appeal is frivolous; or
>
> (2) the dispositive issue or set of issues has been recently authoritatively decided; or
>
> (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument."

The applicable Local Rules adopted by the Third Circuit Court of Appeals are as follows:

> "CHAPTER 1. BRIEFS
>
> A. Prior to Panel Sitting - Four Weeks. Briefs and appendices are distributed sufficiently in advance to afford four weeks study in chambers prior to the panel sitting....
>
> B. Responsibility of Panel Prior to Scheduled Sitting. This court has the tradition of carefully reading briefs and reviewing appendices prior to oral argument or conference. Inherent in Third Circuit Rule 12(6) is the understanding that each judge will read the briefs and review the appendices a minimum of ten days before the first day of the panel sitting....

D. Suggested Criteria for Application of Rule 12(6). Experience discloses that judges usually vote to eliminate oral argument:

a. Where the issue is tightly constrained, not novel, and the briefs adequately cover the arguments.

b. Where the outcome of the appeal is clearly controlled by a decision of the Supreme Court of this court.

c. When the state of the record will determine the outcome and when the sole issue is either the sufficiency of the evidence, the adequacy of jury instructions, or rulings as to admissibility of evidence and the briefs adequately refer to the record."

The Docket entries in this case reveal that on December 1, 1999, there were no Briefs or an Appendix filed. The Appellant's Brief was delivered to the Clerk on December 2, 1999, by Mail. The Docket Entries are made part of the Appendix and the Notation will be found on page 28 of the Appendix. The letter dated December 1, 1999 informing the Petitioner his right to argument was being denied will be found on Page 33 of the Appendix.

The Record filings were not completed until January 13, 2000, two days after the Judgment and Opinion were filed in this case. (Appendix p.39)(Orders Appendix. pp. 152-153)

That alone requires a recusal of all members of the Panel for each of them apparently violated the Rules of Appellate Procedure as well as the Local Rules of the Third Circuit Court of Appeals and predetermined their decision before the record filings were before them. This act coupled with the other acts of the judiciary in this case mandate vacating the Judgment and remanding this matter to a neutral Circuit Court for consideration. There is more than an "appearance" here.

The Opinion which accompanied the Judgment of January 11, 2000 gives further credence to this Petition.

The issues which were raised by the Appellant were more than substantial. Clearly, if they had been addressed, the conviction must be reversed. The primary issue and the most extensively briefed issue, was not even mentioned in the Opinion of the Court. If the issue had been addressed, an acquittal was virtually mandated and the fact it was completely

ignored is additional evidence of bias, prejudice and prejudgment.

That issue was that after the presentation of evidence in the trial, Judge McKelvie concluded the Petitioner had been "negligent". The evidence showed the Petitioner had hired and paid an accountant to prepare the returns, had paid over $67,000 to IRS during the years in question and that amount exceeded his liability by over $37,000 which resulted from an improper assessment of 941 liabilities when the Petitioner had no employees. (A synopsis of the arguments is found in the Motion for Appeal Bail and the answer to the Government's Response, Appendix., pp.154-188)

The accountant testified he had been instructed to file for refunds and prepare the tax returns but he failed to comply with the instructions given him. He claimed he did not have sufficient information.

The specific language of Judge McKelvie is included in the Appendix to this Petition (Appendix pp. 48-60)and may be summarized by quoting that he concluded the Petitioner was negligent; that he had tried to comply by making an effort at gathering financial information and providing it to the Accountant; that the Court concluded the Petitioner was neither defiant nor recalcitrant and that the reason for his failure to personally prepare his returns was because he was disorganized; had no evil motive or intent and manifested an apparent inability to prepare his own returns. This is the antithesis of willful intent as known in the law.

Judge McKelvie then made the rather "strange" statement that he was concerned that the "negligence" of the Petitioner could not "overcome a conclusion of intent". There has never been an explanation of what he meant however Judge McKelvie never mentioned "presumption of innocence" nor "beyond a reasonable doubt" as part of his considerations in concluding guilt. He never mentioned that the criminal charges required the Government prove the late filing was a result of "willful intent".

It appears from a careful reading of the conclusions which are part of the Appendix that he may have applied a civil standard rather than a criminal standard and may have reversed the "burden of proof" requirements.

At the conclusion of the comments, Judge McKelvie was uncertain of the law and asked the Petitioner's counsel to locate any cases which were similar in factual scenario and which resulted in a not guilty verdict. This certainly decries the conclusion in the Opinion filed by Judge Greenberg that concluded: "The evidence of guilt was overwhelming". Judge Greenberg stated that the Petitioner had "an extraordinary disregard of his obligation under the law..." but never acknowledged that the Government admitted the late tax returns had been filed years before the Indictment; that the IRS admitted the taxes had been prepaid for the years in question and that the Petitioner's returns, when filed were not only admittedly accurate but in fact reported more taxes due than an IRS audit located.

As the Brief for the Petitioner illustrated clearly, the Government admitted twice during argument, that the only evidence they had which supported the Government's case was that "He didn't file them", referring to the tax returns. (Appendix pp.61-63)

The Government admitted they had no other evidence and yet Judge Greenberg, without mentioning what evidence he refers to, concludes, three days before the Briefs were filed, that "there was overwhelming evidence of guilt."[10]

The Petitioner's attorneys submitted case law which universally illustrated that if the Court concluded the Government only proved negligence, the defendant must be acquitted. There are no cases which hold to the contrary so this conviction would violate all known applicable law.

Before June, 1999, the Petitioner had not located a case which was very similar in facts to the Petitioners. There were no records of any arrests with the facts similar to the Petitioner' ant therefore, no reported cases. In June, the Petitioner found the case of *Government of Virgin Islands v. Allen* 251 F. Supp. 479 (D.C. Virgin Islands 1966) was an Opinion after a bench

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10

The Brief of the Petitioner referred to pages B-186 and B-189, during the argument wherein the Government admitted the only evidence they could produce in support of "willful failure to file" was the fact "He didn't file them." Copies of those pages are made a part of the Appendix to this Petition.

trial and satisfied the criteria which Judge McKelvie requested. The concluding remarks and findings of the trial judge in that case were dispositive. Citing to *United States v. Palermo*, 259 F.2d 872, (3rd Cir. 1956), which remains the seminal case in the Third Circuit, Judge Gordon, in *Allen* (supra) stated:

> "...the very narrow and essential Question which the Court must determine beyond a reasonable doubt is whether the actions of the defendant showed that his failure to file the tax returns was willful....Mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by evil motive are not probative of willfulness....The actions of the defendant showed he was grossly negligent ... However, the defendant is not charged with gross neglect, but with the willful failure to file income tax returns... the Court is compelled to find the defendant not guilty of each of the charges."

Since Judge McKelvie concluded the Petitioner was "negligent, not even grossly negligent, he must also be not guilty..

In the Opinion filed by Judge Greenberg he avoided this issue by never mentioning the word "negligence" but attempted to avoid having to reverse the conviction by stating:

"...a decades-old district court decision,...would have no bearing on the district court's well-supported finding that Marcone willfully failed to file his tax returns."[11] The reference to the "well supported finding" is a mere platitude for there was no Opinion by Judge McKelvie Judge Greenberg's Opinion which was filed with the attempted to address the issues of recusal. Judge Greenberg spent a page and a half of the seven page Opinion but never addressed the Statutory requirement

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11

This also ignores the fact Judge McKelvie never wrote one word explaining why the "negligent" actions of the Petitioner could be evidence of guilt beyond a reasonable doubt when all the case law is opposite. Further, there was no explanation by Judge McKelvie how a theory of "conclusion of intent" could arise in a criminal charge of "willful" failure to timely file a tax return. Judge McKelvie never referred to presumption of innocence nor that the government must prove guilt beyond a reasonable doubt.

that if there is even an appearance of bias or prejudice a judge "shall" recuse. He claims to speak for each of the judges of the Third Circuit by stating that each judge had "individually considered the motion for recusal and declined to recuse". There is no adherence to the Statutory language nor to the requirement that if an "appearance of bias or prejudice" is in a case, judges are required to recuse.

Nor is there any reference to the fact that Judge Padova and entire Eastern District Court recused due to an appearance of bias or prejudice and even earlier,

The fact the Opinion in this case intentionally sidesteps all of the legal precepts illustrates the prejudgment which existed. As further illustration, the Petitioner refers to the "Grand Jury" issue..

The prosecution had subpoenaed the Petitioner's Psychiatrist and had him testify before the Grand Jury in complete violation of *Jaffe v. Redmond*, 116 S.Ct. 1923, 135 L.Ed. 337, 44 Fed R. Evid Serv. 1 (1996), *O'Donnell v. United States*, 891 F.2d 1079 (3rd Cir. 1989), The Petitioner was not informed of the subpoena nor was it disclosed the Psychiatrist testified until almost a month had passed after the deadline for filing Pre Trial Motions.

The Testimony by the Psychiatrist was unrelated to taxes and was to prejudice the jurors by falsely accusing the Petitioner of theft, causing a disbarment. The Petitioner filed Post Trial Motions asserting prosecutorial misconduct and the Government responded the Petitioner had "waived" the issue by not filing a Pre Trial Motion requesting the Indictment be quashed. There has never been any excuse given by the Government explaining why the Psychiatrist was called to testify and the Government admitted they knew the Petitioner had never discussed the taxes with the Psychiatrist.

Aside from violating the "fundamental fairness" theory which provides there may be no "waiver" of the issue, *United States v. Taylor*, 798 F.2d 1337 (10th Cir. 1986), *United States v. Breslin*, 916 F. Supp. 438 (E.D. Pa. 1996) the Government was unable to defend their failure to inform the Petitioner, pre Indictment, of the appearance and the testimony. There was no mention in the Opinion that the law requires the prosecutor to refrain from engaging in techniques, either knowingly or

inadvertently to lead the Grand Jury to abrogate their role as unbiased fact finders. *United States v. Calandra,* 414 U. S. 338, 94 S.Ct. 613, 617, 38 L. Ed. 2d 561 (1974), *Branzburg v. Hayes,* 408 U.S. 605, 686-87, 92 S.Ct. 2646, 2569, 33 L.Ed. 6265 (1972). Further, a verdict does not render the issue Moot.

Over sixteen months before the Indictment, the Petitioner had proffered information to the Government that during 1989 and 1990,his father was terminally ill and depended upon the Petitioner's physical assistance on a daily basis . The Petitioner was forced to chose to terminate life support and his Mother immediately suffered a debilitating stroke which resulted in complete dependence upon the Petitioner who has no siblings. The illness which caused the original episode in 1986 was the result of a constriction in blood supply to the brain of the Petitioner. His physician, who was also a Psychiatrist, instructed him to curtail any unnecessary stress and overwork or risk a stroke. The purpose for the pre-indictment proffer was not related to a mental illness.

The Petitioner had given a Medical Records release to verify the physical diagnosis. This document is referred to in his Opinion averring the Petitioner "waived" the patient/psychiatrist privilege. Neither the Government, nor Judge Greenberg cited law which could support the theory that a Medical Records release which did not refer to psychiatric records could be a waiver of Patient Psychiatrist. privilege. This decision means any Release would authorize a waiver of patient psychiatrist privilege in direct contradiction of This Court's ruling in *Jaffe v. Redmond* (supra)

Further, the Petitioner had distinguished between the two types of Motions referred to in Federal Rule of Criminal Procedure, 12(b)(2), and showed that the comments following the Rule explain, that if the Motion does not raise an issue which must be decided during the trial, there is no "waiver" (These arguments are in the Motion for Appeal Bail, (Appendix pp. 154 -171) and also in the Answer to the Government's Response. (Appendix pp.172-188)

This "appearance of bias requires vacating the Judgment.

The Petitioner had proven he had prepaid his taxes for 1990, 1991 and 1992. After trial but before sentencing the IRS had admitted he was correct. The sentence in a tax return case

requires a computed tax liability existed. The IRS admission voided the Presentence calculations and the sentence was improperly imposed. There was no restitution ordered since there was no tax liability.

Nonetheless, the Petitioner was sentenced at a level eleven (11) which required a large tax liability. A proper sentence was a level five (5) mandating six (6) months probation. This would have not deprived the Petitioner of his ability to practice law but would have gone contrary to Judge Greenberg's obvious efforts to suspend the Petitioner's license. That incorrect sentence computation was never mentioned in the Opinion filed by Judge Greenberg and is another item manifesting his prejudgment, bias and apparent prejudice.

The only referenced made by Judge Greenberg, in the Opinion to any law which related to the recusal issue was his own Opinion in *Massachusetts Sch of Law at Andover, Inc. v. America Bar Ass'n*, 107 F. 3d 1026, 1043, (3rd Cir 1997) which uniquely admitted the precept that the standard for recusal is whether an objective observer reasonably might question a judge's impartiality. Judge Greenberg's own words prohibit a judge evaluating recusal when the facts give an "appearance of bias or

Therefore, Judge Greenberg's own citation to his 1997 Opinion required he recuse. Therefore, the Judgment must be vacated; a Writ of Mandamus must issue directing the Third Circuit, including Judge Greenberg, recuse and the writ of Prohibition must be granted.

REASONS FOR GRANTING THE WRITS

28 U.S.C. § 455 provides in relevant part"

> a). Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> b). He shall also disqualify himself in the following circumstances:
>
> 1. Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;"

In *Liteky v. United States,* 510 U.S. 540, 114 S. Ct. 1147 (1994), the law was clarified and the 1974 revision to 28

*U.S.C.A. §§ 144, 455(b)(1)*, prohibiting a judge's participation in a case in which he has an interest or relationship to a party brought into the statute elements of general bias and prejudice recusal that had previously been addressed only in dealing with recusal of a district judge or bias in general was applicable to all justices, judges and magistrates, not just district judges. This Court, speaking through Justice Scalia and affirmed by all other Justices noted that in determining whether a judge is governed by the statute requiring disqualification the determination is not made on a subjective basis but on an objective basis. What matters is not the reality of bias or prejudice, but its appearance. Recusal is required whenever impartiality might reasonably be questioned.

This Court defined the terms, "bias" and "prejudice"used in the recusal statute as terms which connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved and if it is possible the judge who makes the disposition of a case has possibly come to the conclusion that the litigant may be a "throughly reprehensible person", if procured in proceedings outside the realm of the case being decided, requires recusal.

The Federal Recusal Statute imposes a strict procedure on Judges. This Court has declared: "to perform its high function in the best way, 'justice must satisfy the appearance of justice." *Village of Monroeville*, 409 U. S. 57, 60, 93 S.Ct. 80,, 83, 34 L.Ed.2d 267 (1972), *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct.11, 13, 99 L.Ed. 11 (1954). When a judge is asked to recuse, there is no burden upon the litigant to prove anymore than a possible appearance of bias or prejudice.

Examining the holdings in Third Circuit cases where the Court required a lower Court to recuse, the standard adopted by the Third Circuit mandates recusal. Had the Third Circuit followed Its' own Rulings the Judges were mandated to recuse.

The Third Circuit has said if there have been any incidents, which, if known to a reasonable man, would cause him to harbor doubts about the judges impartiality under the applicable standards, then the judge must recuse. *Prudential Ins. Co. of America Sales Practices Litigation, In re.,* 148 F.3d 283 (3rd Cir. 1998).

In deciding whether a judge or judges should be

disqualified based upon appearance of judicial partiality, the reviewing court inquiry must focus not on whether a judge actually harbored subjective bias, but rather on whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias. *Antar, in re.* 71 F.3d 97, (3rd Cir. 1995).

In *United States v. Antar*, 53 F.3d 568 (3rd Cir. 1995), the Third Circuit reviewed a statement made by a judge during sentencing. The Judge had stated; "My object in this case from day one has always been to get back to the public that which was taken from it as a result of the fraudulent activities of this defendant and others. That statement even reversed convictions of other persons in the appellant's family. (Greenberg, J.)

The Third Circuit decided; absent any other actions or statements made by the judge which might reasonably be interpreted as evidence of bias or prejudice, that statement alone created an appearance of prejudice.

The Opinion in *Antar, in re:* (supra) noted:

> "Because we seek to protect the public's confidence in the judiciary, our inquiry focuses not on whether the judge actually harbored subjective bias, but rather on whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias [12]..

In *Antar, in re:* (supra), the Third Circuit Court concluded that the judicial mandate required a judge to "provide a fair trial and impartial forum for the litigants before him." This is a basic requirement of due process.

The Third Circuit further opined that actual bias or prejudice of a judge or judges is not the test for deciding to reassign a case. In *Litsky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed. 2d 474 (1994), This Court emphasized the most critical factor in assessing a judges unfavorable disposition toward a litigant was not the source of the judges prejudicial knowledge or bias, but rather the judge's inability to render a fair judgment.

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12

Citing *Antar 1,* 53 F.3d at 574, United States v. Bertoli, 40 F.3d 1384, 1412 (3rd Cir.1994); Alexander, 10 F.3rd at 162; Haines v. Liggett Group Inc., 975 F.2d 81, 98 (3rd Cir. 1992)

In this case, the threshold issue has already been decided by examining the actions of the entire Bench of the Eastern District Court. In the decision made by those thirty five (35) judges, considering the fact they had voted in favor or readmission to the Bar of their Court, might give an appearance of partiality, they recused upon request. Judge Padova, who was a member of the Standing Committee on Attorney Discipline in the Eastern District Court had sua sponte recused simply because he had an association with the discipline case in 1989.

The Third Circuit however, denied the requested recusal even though just two weeks earlier, the Court had suspended the Petitioner. On October 18, 1999, the attorney representing the Petitioner had alerted the Chief Judge of the Third Circuit that to vote on the disciplinary issue just before the Court would consider the merits of the tax case would require recusal.

It is difficult to explain why the disciplinary case had to be voted upon while the tax case was being submitted. The Rule to Show Cause was issued on August 12, 1998, and certainly, time was not of the essence. The fact the disciplinary Report and Recommendation was urged to a vote by the Standing Committee within two weeks of the assignment of the tax case in itself gives rise to issues of motive and intent to cause bias and prejudice.

It appears that Judge Greenberg may have insisted the issue be presented to the entire bench in an effort to intentionally prejudice the other judges against the Petitioner. Nonetheless it created another appearance of bias or prejudice.

If the Panel determining whether Appeal Bail should be granted made their finding before the vote to suspend, is it possible to ignore the fact the merits panel immediately determined to deny argument, in violation of the Rules of The Third Circuit which required full review of all the briefs and appendices. The result is more than an "appearance" of bias or prejudice. A violation of Rules by Judges always appears improper.

The Third Circuit Rules further state that Briefs and Appendices are distributed sufficiently in advance to afford four full weeks study in chambers prior to the panel sitting. ( Chapter 1. A. Prior to Panel Sitting.) In this case, the Opinion was filed and the Judgment entered before the Briefs and Appendices

were filed. Chapter 1, B. "Responsibility of Panel Prior to Scheduled Sitting" states:

> *"This court has the tradition of carefully reading briefs and reviewing appendices prior to oral argument or conference. Inherent in Third Circuit Rule 12(60 is the understanding that each judge will read the briefs and review the appendices a minimum of ten days before the first day of the panel sitting."*

The decision to deny argument was made immediately and there were no Briefs to review. This becomes a "smoking gun" manifesting more than a mere appearance of prejudgment. The Judgment and Opinion were filed on January 11, 2000 and on January 13, 2000, two Orders were signed by Judge Greenberg. They permitted the last filings to occur and are reproduced in the Appendix on pages 152, 153)

The Petitioner has therefore illustrated his request for Recusal was based upon facts and the record. He had sought recusal, predicting prejudice and prejudgment from Judge Greenberg. His predictions were accurate for the Opinion manifests more than an "appearance" of prejudgment, bias or prejudice.

There is another reference which may give an additional illustration to the prejudgment present in this case. The reference to the Attention Deficit Disorder diagnosed after the trial and the manner in which Judge Greenberg attempted to dispose of what was clearly "newly discovered evidence".

Judge Greenberg's Opinion dismisses the issue by observing that the disorder should have been observed by the Petitioner before trial and that the disorder would have no affect upon the ability to prepare tax returns considering the Petitioner could practice law with the disorder.

This evidences the fact Judge Greenberg never read the record nor the briefs. The un-refuted testimony by the Psychologist was that the disorder was only medically identified to exist within adults within the past few years. It was believed the disorder cleared after adolescence. Further, the Psychologist stated the medical profession had recently observed 40% of the entire adult population have the disorder and most were unaware of what it is and had learned to "mask" the disorder as they matured, but the disorder did not dissipate. The Opinion

also chose to ignore the fact the Petitioner had diligently sought medical help since 1986. The testimony revealed even experienced Psychiatrists have difficulty diagnosing the "masked" disorder.

Also, the Psychologist testified the disorder would tend to enhance the performance of a trial lawyer but would not support the regimen and thought process required by an accountant. There was no testimony which refuted this diagnosis yet Judge Greenberg claimed the condition must be ignored since the Petitioner had not been diligent in determining the presence and affect of the disorder. He also ignored the fact the disorder was brought to the attention of the Petitioner after trial when an Assistant United States Attorney who had tried many cases with the Petitioner when he was an Assistant District Attorney recognized the symptoms due to a study he was conducting for his own child's personal disorder. The Petitioner testified he had heard of ADD but believed it was a "learning disorder". In fact, it is a learning enhancement which induces "boredom" and distraction or "impatience" with tedious tasks. The "excitement of a trial stimulates impromptu and intense learning capacities of an ADD person.

As to the entire Bench of the Third Circuit, the fact the other members of the bench were subjected to the advocacy of the Report and Recommendation and discussions with Judge Greenberg, during the decision to suspend the Petitioner have rendered any participation by the Third Circuit Bench to require recusal since impartiality might reasonably be questioned.

As This Court has said, if it appears from facts in the case that there may be a deep seated favoritism or antagonism that would make fair judgment impossible, recusal is not an option, it is required by statute. To fail to recuse is to violate a Congressional mandate to recuse.

The Order denying the requested recusal of the Third Circuit Judges does not give any reason except to state the Judges believe the decision to recuse is a personal one and they chose not to recuse. The decision to recuse is not a personal one for the Supreme Court has clearly set the standard in the discussion in *Liteky* (supra).

Most important perhaps is the fact that there were at least fourteen (14) other Judges available to hear this Appeal.

That did not include Senior Judges who did not vote on the disciplinary case and visiting Judges who could have avoided the appearance of bias or prejudice. The continuous "assignment" of Judge Greenberg to the personal cases involving the Petitioner as well as the immediate and continuous denial of argument alone creates an appearance or suspicion of bias or prejudgment.

In *Litecky*, (supra), Justice Scalia noted that while the prior rule had been the bias or prejudice had to arise from "extrajudicial" sources, even where the bias or prejudice was clearly within the proceedings themselves, the doctrine would not apply and recusal would be required. The revisions in the statute in 1974 have placed the obligation to identify the existence of grounds for recusal upon the judge himself, rather than requiring recusal only in response to a litigant's affidavit alleging bias or prejudice. Those provisions however deal primarily with the provisions of sub paragraph (b) of the statute which requires the judge to search his financial and personal and social records to determine if he has had some relationship, no matter how remote , with one or more of the litigants. As to sub paragraph (a) however, the determination is an objective, rather than a subjective standard and the judges' personal choice is not the standard.

The standard clearly announced in *Liteky* (supra) is taken directly from the mandate of the Statute.

This Court stated quite clearly that what matters now is not the reality of bias or prejudice but its appearance. Therefore whenever "impartiality might reasonably be questioned", recusal is required.

In this case the appearance of bias or prejudice arose during a collateral matter in which the personal and professional reputation of the Petitioner was the subject matter and where the judge who affirmed the tax case had just advocated the Petitioner be suspended in violation of the law and precedence.

Therefore, in this case, there is no question that the favoritism came from the "extrajudicial source" since it came from the disciplinary case rather than from the tax case.

As Justice Scalia observed in *Liteky*, (supra); "Recusal is required whenever there exists a genuine question concerning

a judge's impartiality and not merely when the question arises from an extrajudicial source. Therefore, if the surrounding facts suggest partiality or bias, as they do here, it is not necessary that they arise from an "extrajudicial source" because This Court now recognizes that wherever the source is, either "extrajudicial" or not, the "plain language" argument has been adopted by The Court and since subsection (a) of the Statute deals with the objective appearance of partiality, it covers all aspects of partiality, not merely those specifically addressed in subsection (b) of the statute. (FN2 Liteky Opinion.) The judge therefore does not have to be subjectively biased or prejudiced, so long as he appears to be so.

This standard therefore permits the Petitioner to identify various reasons why bias or prejudice appears in this case. That is all the Petitioner is obligated to do and the Statute then states, the judge "shall" recuse. This is not a personal choice, for once the litigant is able to identify an appearance of prejudice, the personal choice of the judge whose recusal is being sought "shall" recuse as is mandated by the Statute.

In describing what This Court considers reasonable appearance of bias or prejudice, it was noted that even judicial remarks made during a trial which normally would not be a basis for recusal do become a basis if they reveal an opinion that derives from an extrajudicial source and if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Justice Kennedy in *Liteky* (supra) notes he would not even require an inquiry into the source of the bias or prejudice for if there is an appearance of partiality, recusal is required. Under either interpretation of the Recusal Statute, the actions of the Third Circuit; the timing of the collateral and parallel decisions and assigning the merits determination in the tax case to a clearly antagonistic and adversarial judge require recusal or the Statute is violated. Even applying the "high threshold" referred to by Justice Kennedy, if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute, that becomes the requisite appearance of bias or prejudice which requires recusal.

As Justice Kennedy observed:

> "A judge may find it difficult to put aside views formed during some earlier proceeding. In that instance we would expect the judge to heed the Judicial oath and step down, but that does not always occur. If through obduracy, honest mistake, or simple inability to attain self-knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source....the neutral inquiry under 455(a) is the appearance of partiality, not its place of origin... See Liljebert, 486 U.S. at 860, 108 S. Ct. at 2203 ('[t]he goal of section 455(a) is to avoid even the appearance of partiality...United States v. Chantal, 902 F.2d 1018, 1023 (CA1 1990).

Citing to *Hall v. Small Business Admin.*, 695 F. 2d 175, 179, (CA 5 1983), Justice Kennedy noted that the appearance of partiality may arise even when in fact there is none. That appearance of partiality however will nonetheless require recusal and the individual judges do not have a personal preference to deny the relief sought.

In this case the Judges of the Third Circuit erred in individually considering a subjective rather than an objective appearance of bias or prejudice. Congress demands the recusal "shall" occur when it might appear to a reasonable person that bias or prejudice or prejudgment might occur.

Once the Eastern District Court recused based upon lesser reasons and where Judge Padova recognized his impartiality might be questioned for an involvement eight years earlier, it is impossible to accept the conclusion of no appearance of bias or prejudice in the acts of the Third Circuit.

Once the Third Circuit is required to recuse, the issue of Judge Greenberg's activities which go beyond the "appearance" of bias or prejudice, becomes moot. All the Petitioner is asking is to be provided a "level playing field" where the issues in his criminal charges will be impassionately decided by a Bench which has not been influenced by a collateral matter which has created more than a mere appearance of partiality.

## CONCLUSION

The Petitioner requests the United States Supreme Court to issue a Writ of Mandamus Recusing the Third Circuit Bench on the basis of the *Recusal Statute, 28 USC §455 (a)* which requires recusal whenever it appears a reasonable person, viewing the facts, might reasonably question the impartiality of the proceedings.

The Third Circuit rejected the request for Recusal, ignoring the clear appearance of bias or prejudice and that the objective rather than a subjective standard must be applied. *Litsky v. United States,* (supra). .

The entire Third Circuit Bench had voted to suspend the Petitioner from the Bar with no charges filed against him. That suspension was observed by a member of the Board of Governors of the American Bar Association, as unprecedented and did not meet the standards of attorney discipline cases.

That observation alone would give rise to a reasonable man doubting the impartiality of the Bench.

The entire Bench of the Federal District Court for the Eastern District of Pennsylvania had recused from participation on the basis that they would create an appearance of partiality or bias in favor of the Petitioner. To ignore that decision would be to assume the entire Bench of the Eastern District Court erred in concluding there was an "appearance" of partiality or bias.

Further, and more specifically, the Petitioner has sought and has been denied the recusal of Judge Greenberg.

The denial resulted in the Petitioner being subjected to the "advocacy "of Judge Greenberg who had personally initiated the unprecedented personal attack upon the Petitioner; actively sought the disbarment of the Petitioner and had personally procured records which he apparently believed would accomplish his goal. There is nothing more precious and jealously guarded by an attorney than his license to practice law. Any attack upon that right becomes a mortal wound and when the person bringing that attack is a judge, rather than an advocate, the appearance of personal bias and partiality not only exists, but is a glaring example of actual, rather than perceived prejudice.

Coupling that example with the record which evidence intervention by Judge Greenberg in any personal matters

involving the Petitioner before the Third Circuit, and the issues become more convincing to a reasonable observer that an appearance of bias or prejudice prevails.

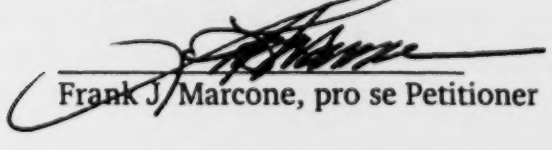
When the record in the case before the Court is taken by the same judge, who immediately ignores the Rules of the Court and prematurely prohibits argument, more than an appearance exists. Then when the Opinion fails to even address the issues which virtually mandated a reversal the suspicions darken. Following those observations with the fact the Opinion rendered in violation of every Court Rule related to a reasonable consideration of the Briefs and Appendices, must convince This Court that intervention is necessary.

The Petitioner is simply requesting a "level playing field" where the issues in his case are examined by a neutral, unbiased and impartial forum. That request is simply to apply due process to this case where a lack of due process and ignoring the Rules has become the standard, rather than the exception. The Petitioner is defenseless unless granted relief by the United States Supreme Court.

Most ironic however is the language used by Judge Greenberg in his Opinion in *United States v. Antar* (supra), decided just five (5) years ago. He said, "By the statutory language itself...§ 455(a) mandates an objective rather than a subjective inquiry...the public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted, requires that 'justice must satisfy the appearance of justice...therefore, if a reasonable man ...would harbor doubts about the judges'; impartiality, ...the judge must recuse...the [I]mpartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American Legal system."

The Petitioner requests the Judgment of the Third Circuit be vacated, the Third Circuit be recused and the appeal referred to a remote Circuit.

Respectfully submitted,



Frank J. Marcone, pro se Petitioner

# APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

:

v : CRIMINAL NO. 98-544-1

:

FRANK MARCONE :

FILED DEC 21 1998

ORDER

AND Now, this *21st* day of December, 1998, upon consideration of defendant's Motion to Recuse (Doc. #30) to which the government has stated it "does not object," because although after discussion with counsel for the parties the undersigned concurs that for reasons of appearance it would be appropriate to assign this non-jury case to a judge who was not privy to the recent disciplinary proceedings involving defendant in this Court, only the Chief Judge of the District can effect the requested recusal of the entire Court and only the Chief Judge of the Circuit can make the requested designation of a judge from another district to adjudicate this case, IT IS HEREBY ORDERED that said Motion shall be referred by the Clerk to the Chief Judge of the District for such resolution as he deems appropriate.

BY THE COURT:

ENTERED *12/21/98*
CLERK OF COURT

*J. Waldman*
JAY C. WALDMAN, J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
v. :
:
FRANK MARCONE :
CRIMINAL NO. 98-544-1

AND NOW, this 22nd day of December, 1998, it is

ORDERED that excludable time in the above-captioned case be computed and entered in the record from the date of filing of the Defendant's Motion for Recusal, filed on 12/16/98 until such time that a hearing on said motion is concluded or other prompt disposition is made.

Hon, Jay C. Waldman,
Judge

BY THE COURT:
ATTEST:

*Carole Conroy*
Deputy Clerk

(CODE - E)

ENTERED: DEC 23 1998
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA: CRIMINAL NO. 98-544

vs. :

FRANK MARCONE :

MOTION TO RECUSE

Defendant, Frank J. Marcone, by and through his attorneys, Joseph M.. Fioravanti, Esquire and Arthur Thomas Donato, Jr., Esquire, moves for recusal of the assigned Trial Judge as well as all other Judges of the United States District Court f or the Eastern District of Pennsylvania pursuant to 28 U.S.C. §455(a).

Respectfully submitted

JOSEPH M. FIORAVANTI,
ESQUIRE

ARTHUR THOMAS DONATO, JR.,
ESQUIRE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

: CRIMINAL NO. 98-544

v. :

:

FRANK MARCONE :

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RECUSE

On October 8, 1998, Frank Marcone was indicted and charged with three counts of Failure to File Tax Returns in violation of 26 U.S.C. §7203. The case was assigned for trial to the Honorable Jay C. Waldman and trial was set for Monday, December 14, 1998.

The accused is an attorney licensed to practice in the United States District Court for the Eastern District of Pennsylvania after recently being reinstated to that court. The accused remains suspended from the practice of law before the Bar of the Supreme Court of the Commonwealth of Pennsylvania. The Judges of the United States District Court for the Eastern

District of Pennsylvania heard evidence at hearings and considered submissions on Mr. Marcone's application for reinstatement. Ultimately, that Court re-admitted Mr. Marcone as of September 28, 1998.

Because of the issues in the instant criminal case as well as the
propriety of certain defenses, the accused has waived his right to have .
this case heard by a jury of his peers, and instead wishes to elect to proceed to trial before a Judge sitting without a jury. The government
has acquiesced in this request.

Because the Judges of the United States District Court for the
Eastern District of Pennsylvania may have prior knowledge of this defendant as a result of his recent re-admission hearings and submissions, the consideration of Mr. Marcone's criminal case by a Judge of the United States District Court for the Eastern District of Pennsylvania sitting without a jury puts that Judge in an awkward position in that his or her impartiality might reasonably be questioned
by either the government or the accused.

28 U.S.C. §45S (a) provides:

> "§455. Disqualification of justice, judge, or magistrate
>
> (a)Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding

in which his impartiality might reasonably be questioned."

To avoid that appearance of impropriety, the defense submits that it would be appropriate for all members of the United States District Court for the Eastern District of Pennsylvania to recuse themselves and have the Chief Judge of the United States Court of Appeals for the Third Circuit, pursuant to that court's internal procedures, designate a judge from outside the Eastern District of Pennsylvania but within the ThirdCircuit to hear the criminal case involving the matter joined between the government and Mr. Marcone.

Respectfully submitted,

_____

JOSEPH M. FIORAVANTI, ESQUIRE

_____

ARTHUR THOMAS DONATO., ESQUIRE

CERTIFICATE OF SERVICE

We, Joseph M. Fioravanti, Esquire and Arthur Thomas Donato, Jr., Esquire, hereby certify that a copy of the Motion to Recuse and Supporting Memorandum was forwarded to the individuals whose names and addresses are listed below:

BY HAND DELIVERY:
The Honorable Jay C. Waldman
United States District Court for the
Eastern District of Pennsylvania
US Courthouse, Room 9613
601 Market Street
Philadelphia, Pennsylvania 19106

BY FACSIMILE:

Joan L. Markman, Esquire
United States Attorney's Office
615 Chestnut Street, Suite 1250
Philadelphia, Pennsylvania 19106-4476

JOSEPH M. FIORAVANTI, ESQUIRE
217 North Monroe Street
Media, Pennsylvania 19063
(610) 892-7370

ARTHUR THOMAS DONATO, JR., ESQUIRE
211-213 North Olive Street
Media, Pennsylvania 19063
(610) 565-4747
Attorneys for Defendant

DATED:_____

UNITED STATES COURT OF APPEAL

FOR THE THIRD CIRCUIT

No. 99-1842

UNITED STATES OF AMERICA

v.

FRANK J. MARCONE,

Appellant

On Appeal from the United States District Court

for the Eastern District of Pennsylvania

(D.C. Crim. No. 98-00544)

BEFORE: MANSMANN, GREENBERG, and MCKEE, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34. 1 (a) on December 16, 1999.

On consideration whereof, it is now hereby ADJUDGED and ORDERED by this Court that the judgment of conviction and sentence of the district court entered October 18, 1999, be and the same is hereby affirmed.

ATTEST:

Dated January 11, 2000

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 99-1842

UNITED STATES OF AMERICA
v.
FRANK J. MARCONE,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 98-00544)
District Judge: Honorable Roderick R. McKelvie

Submitted under Third Circuit LAR 3 4. 1 (a)
December 16, 1999

BEFORE: MANSMANN, GREENBERG, and MCKEE,
Circuit Judges

(Filed: January 11, 2000)

OPINION OF THE COURT
PER CURIAM

Appellant Frank J. Marcone appeals from the judgment of sentence and conviction entered against him following his conviction on three counts of willful failure to file income tax returns for the years 1990 through 1992 contrary to 26 U.S.C. § 7203. The district court convicted Marcone on these counts

following a bench trial and thereafter sentenced Marcone on each count to imprisonment for four months to be followed by a four-month period of house arrest to be followed in turn by one year of supervised release. The sentences on the three counts were to be concurrent. On this appeal Marcone advances the following issues:

I . The government presented evidence which was insufficient to support the verdict, as a matter of law;

2. After verdict, the appellant presented a case requested by the court which required the court to change the verdict to a judgment of acquittal;

3. The prosecutorial misconduct before the grand jury requires the court dismiss the indictment;

4. Trial counsel was ineffective in not interviewing the defendant's physician and not presenting the physician's testimony;

5. The government witness has recanted his testimony and the recanted testimony entitles the appellant to a new trial as a result of newly discovered evidence;

6. After trial the appellant discovered he has attention deficit disorder ("ADD") which affected his ability to form the requisite intent. That diagnosis is "newly discovered" evidence and requires a new trial;

7. After trial the government admitted the appellant had prepaid his taxes for 1990 and 1991, thereby changing the entire theory of the prosecution, requiring a new trial;

8. At sentencing, the court failed to apply the proper tax liability standard and sentenced improperly, requiring a new sentence be imposed.

We deal initially with a preliminary matter which Marcone raised on this appeal.

Shortly before the submission date of this case to the panel, he moved to recuse all of the active judges on the court "from participating in the decision to be rendered" except for Chief Judge Becker and Judge Rendell. The basis for his application was primarily that the judges he sought to have recused participated in a decision rendered on November 26, 1999, in a disciplinary matter entitled In the Matter of Frank J. Marcone, C.A. Misc. Record No. 89-8079, which resulted in an order suspending him from the practice of law "for a period of four years from the date of this Order and until such time as he is reinstated to practice law by the Supreme Court of Pennsylvania, whichever is later." Marcone apparently did not include Chief Judge Becker and Judge Rendell in his motion because Judge Becker, though not indicating what action he would take in the disciplinary proceeding, dissented from the order that the court entered, and because Judge Rendell did not participate in the disciplinary proceeding.

The members of this panel and the other active judges of the court, except for Chief Judge Becker and Judge Rendell, individually considered the motion for recusal and declined to recuse, and we take this opportunity to explain this decision, at least to the extent that the members of this panel reached it. The disciplinary proceeding to which Marcone refers was a reciprocal proceeding based on his suspension by the Supreme Court of Pennsylvania. Notwithstanding Marcone's contrary view, there is no reason at all to believe that by reason of that proceeding the impartiality of any judge of this court in this unrelated criminal

proceeding reasonably might be questioned. See 28 U.S.C. § 3 455(a); see also Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n, 107 F.3d 1026, 1043 (3d Cir. 1997). Indeed, Marcone's exclusion of Chief Judge Becker from his motion shows that the real basis for the motion is that the other judges who participated in the disciplinary proceeding voted to suspend him but Chief Judge Becker did not. Obviously, he believes, quite incorrectly, that the circumstance that the judges ruled against him demonstrates bias against him. See Liteky v. United States, 5 10 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994). The fact is, however, that the court suspended Marcone not because of bias but because of the reasons that the Standing Committee on Attorney Discipline set forth in its Report and Recommendation. Moreover, the mere fact that judges voted to suspend Marcone from the practice of law before this court in no way had any effect in the court's consideration of this case. Thus, the members of this panel declined to recuse.

On the merits, we will affirm. The evidence of guilt was overwhelming. Indeed, the evidence established that Marcone had an extraordinary disregard of his obligation under the law even though as a member of the bar he surely was fully aware of his obligation. In the circumstances, we cannot possibly interfere with the judgment of the district court unless some error in the proceedings requires that we do so. See United States v. Punaitore, 910 F.2d 1084, 1129 (3d Cir. 1990). We carefully have examined each point that Marcone has raised and we find them to be clearly without merit. Nevertheless we will comment on certain contentions that Marcone makes.

There is no merit to Marcone's contention that the district

court abused its discretion by denying his motions for a new trial based on newly discovered evidence. Before a court may order a new trial based on newly discovered evidence, five requirements must be met: (1) the evidence must have been discovered since trial; (2) facts must be presented from which the court may infer diligence on the part of the moving party; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be such that it probably would produce an acquittal on retrial. See United States v. DiSaivo, 34 F.3d 1204, 1215 (3d Cir. 1994). None of the items of "newly discovered evidence" proffered by Marcone meets these requirements. Indeed, one of Marcone's items of "evidence" -- a decades-old district court decision, Government of the Virgin Islands v. Allen, 251 F. Supp. 479 (D.V.I. 1966) -- is not "evidence" at all, and would have had no bearing on the district court's well-supported finding that Marcone willfully failed to file his tax returns.

Nor does evidence of Marcone's attention deficit disorder warrant a new trial. According to Marcone's motion papers in the district court, this disorder, although not formally diagnosed until after trial, has manifested itself for many years. See supp. app. at 397-99. Accordingly, Marcone fails on the diligence requirement. In any event, since this disorder apparently did not prevent Marcone from practicing law, then certainly it did not prevent him from filing tax returns for the years in question.

We also reject Marcone's ineffective assistance claim in relation to his trial counsel's decision not to present testimony from his psychiatrist, Dr. Fink. Marcone contends that such testimony would have assisted him in establishing a diminished

capacity defense, and he claims his counsel never actually interviewed Dr. Fink. Even if trial counsel did not interview Dr. Fink, a point that is in dispute, we cannot question counsel's action in not presenting Dr. Fink's testimony at trial. Dr. Fink rendered an opinion as to Marcone's good mental health in November 1990, see supp. app. at 414, and he did so again in April 1998 in connection with Marcone's attempts to be reinstated to the practice of law in the courts. See supp. app. at 40 1. Accordingly, counsel hardly could have concluded that Dr. Fink's testimony would be helpful in establishing that Marcone was incapable of performing the relatively simple task, as compared to practicing law, required of the majority of adult Americans, of filing his tax returns. Consequently, under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), we cannot grant relief by reason of Marcone's counsel not having called Dr. Fink as a witness. Indeed, the circumstances here are so clear that, as Marcone requests, we are entertaining his ineffective assistance of counsel argument on direct appeal rather than requiring him to institute a collateral proceeding to raise the issue. See United States v. Cocivera, 104 F.3d 566, 570-71 (3d Cir. 1996).

Marcone's claim of prosecutorial misconduct before the grand jury related to the fact that the prosecutor called Dr. Fink as a witness before the grand jury. In Marcone's view, the calling of Dr. Fink and the method of his questioning violated the "patient-psychiatrist privilege" and infringed Fed. R. Evid. 501 and 704. We reject this argument for several reasons. First, Marcone waived the privilege in writing before Dr. Fink testified before the grand jury. See supp. app. at 417. Second, Marcone waived any objection that he otherwise might have had to the testimony, -

because he failed to seek a dismissal of the indictment before the trial on the basis that the government improperly called Dr. Fink as a witness, even though he knew before trial that Dr. Fink testified before the grand jury. See Fed.R.. Crim. P. 12(b)(1) and (f); Davis v. United States, 41 1 U.S. 233, 93 S.Ct. 1577 (1973). Third, the conviction eliminated the issue as a basis for reversal. See Bank of Nova Scotia v. United States, 487 U.S. 250, 255-56, 108 S.C t. 2369,2373-74(1988). Fourth, there is no reason to believe that the grand jury would not have indicted Marcone without Dr. Fink's testimony, as it is not disputed that he had not filed his tax returns within the time periods required by law. Thus, the testimony did not prejudice Marcone. See United States v. Soberon, 929 F.2d 935, 940 (3d Cir. 1991).

We have reviewed Marcone's other claims of error and, as we have indicated, find them to be clearly without merit.

The judgment of conviction and sentence entered October 18, 1999, will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN THE MATTER OF
FRANK J. MARCONE, ESQUIRE
AN ATTORNEY AT LAW

(NO. 690 DISCIPLINARY DOCKET NO. 2)
(DISCIPLINARY BOARD NO. 16 DB 88)
C.A. MISC. RECORD NO. 89-8079

RESPONSE TO THE RULE TO SHOW CAUSE
WHY A FOUR YEAR SUSPENSION
FROM PRACTICE SHOULD NOT BE IMPOSED

FRANK J. MARCONE, ESQUIRE, having been notified of a suspension of four (4) years from the practice of law, files this Response to the Order to Show Cause Why a Suspension Should Not be Imposed and avers as follows:

1. The Attorney specifically requests to be heard in person in defense or mitigation and requests the Standing Committee set a Hearing date pursuant to the provisions of Rule 10 referring to contested proceedings.

2. The Respondent Attorney avers:

(a) The procedure resulting in his suspension was lacking in notice as to -the proposed discipline and that the discipline imposed was without basis and was without precedent so as to constitute a deprivation of due process.

(b) That the Respondent Attorney has found evidence which would cause the outcome of the discipline proceedings to be different and has been deprived of an opportunity to present that evidence. He has

requested the matter be remanded for further Hearings and that request has not been acted upon by the Supreme Court of Pennsylvania.

(c) That there was an infirmity of proof establishing the alleged misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion on that subject.

(d) The imposition of the same discipline by this Court would result in grave injustice.

(e) That the misconduct if established should be deemed by this Court to warrant substantially different discipline.

(f) That the Chief Judge of the Eastern District has reconsidered the Order of Suspension before that Court, and it is probable the Respondent Attorney will be soon readmitted.

(g) That the incident upon which the suspension is based results from an allegation that the Respondent Attorney received funds as the result of a Power of Attorney assigning him a bail refund and did not promptly pay them over to the one who posted the bail. The Respondent Attorney has evidence the funds, in fact, represented a fee.

WHEREFORE, the Respondent Attorney respectfully requests this Court to convene a Hearing Committee pursuant to the provisions of Rule 10.

RESPECTFULLY SUBMITTED,

*Frank J. Marcone, Esquire*

FRANK J. MARCONE, ESQUIRE

FILED IN AUGUST, 1989

MISCELLANEOUS RECORD

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

MISC. No. 89-8079

Title of Proceeding

In the Matter of

FRANK J. MARCONE
An Attorney at Law

Attorneys For Appellant:

Mr. Greenbaum:
Phone # 215-419-6555
Fax # 215-419-6555

District and No. Below:
Supreme Court of Pennsylvania
690 Disc. Docket No. 2; Disc. Board No. 16 DB 88

Judge Below:
Date of Judgement:

For Appellee:
Frank J. Marcone, Esquire
2530 North Providence Road
Upper Providence, PA 19063
(215) 565-0734

NATURE OF PROCEEDING:
19/Attorney Disciplinary

Proceedings

Robert D. Greenbaum, Esquire
Robert D. Greenbaum & Associates
One Liberty P1ace, Suite 4900
1650 Market Street
Philadelphia, PA 19103

| Date | PROCEEDINGS | FILINGS - Filed |
|---|---|---|

1989

N6v.-27 Certified copy of order, dated 10/11/89, received from the Prothonotary of the Sup. Ct. of Pa. suspending Frank J. Marcone from the Bar of that Commonwealth for a period of four years, etc. , rec'd. 10/16/89

Nov. 27 Order (Clerk) directed to Frank J. Marcone, Esq. to show cause, in writing, within 30 days, why he should not be suspended from the Bar of this Court for a period of four years, commencing 10/11/89.

Nov. 27 Certified copy of above order to Frank J. Marcone, Esq., by certified mail, return receipt requested, together with a copy of the Sup. Ct. of Pa. Order, Declaration Form and a copy of the Rules of Attorney Disciplinary Enforcement.

Dec. 27 Declaration Form submitted by Frank J Marcone, Esq.

Dec. 27 Response to the Rule to Show Cause why four year suspension from practice should not be imposed, Submitted by Frank J. Marcone, Esq (dh)

1990

Jan. 2 Copy of above response to Standing Committee on Attorney Discipline (dh)

Feb. 21 Order (Sloviter, Stapleton, Greenberg, CJ) directing respondent to advise court in writing, within 10 days of the date of order,whether he wishes court to schedule hearing or enter stay and to amend concluding - paragraph of Court's 11-27-89 order to read as follows:

It is ordered that Frank J. Marcone, show cause in writing, within 30 days why he should not

be suspended from the Bar of this Court, for a period of four years, commencing on the date that discipline is imposed. (dh)

Feb. 21 Cert. Copy of above order to Frank J. Marcone, Esq. by cert. mail, return receipt requested. (dh)

Mar. 2 Letter, dated Feb. 27, 1990, from Frank J. Marcone, Esq. requestinga hearing for purpose of taking testimony pursuant to Rule 5 and10 of Rules of Attorney Disciplinary Enforcement. Additional request by respondent for sufficient time to consult with counsel upon their return on or about March 19, 1990. (dh)

Mar. 2 Above letter to standing Committee on Attorney Discipline with request for further direction. (dh)

Mar. 7 Memo (Hon. Morton I. Greenberg) directing Clerk's office to send notice to Frank J. Marc6ne, Esq. granting request for additional time until March 19, 1990, but stipulating that Court will not re-examine Findings of Supreme Court of Pennsylvania as to violations as long as Supreme Court of PA adheres to determination (dh)

Mar. 7 Letter to Frank J. Marcone as directed in above memo.(dh)

Mar. 14 Call from Hon. Leonard I. Garth's Secretary, requesting additional information on the proceedings in the U.S.D.C. for Eastern Dist.of PA, since Frank J. Marcone, in answer to show cause order, indicated that District Court was reconsidering Court's suspension order and that he probably would be readmitted.(dh)

Mar. 14 Copy of docket entries and 11-30-89 suspension order received from Carol Sampson of the U.S.D.C.

for the Eastern District of PA (dh)

Mar. 15 Copy of above docket entries and suspension order to Standing Commit. on Attorney Discipline (dh)

Mar. 21 Letter, dated 3-19-90, from Mr. Marcone requesting a hearing in accordance with the Disciplinary Rules.

Mar. 21 Copy of above letter to Standing Committee on Attorney Discipline (di)

Mar. 23 Memo (Hon. Morton I. Greenberg) advising that hearing will be scheduled and requesting a copy of the June 16, 1989 report of the Disciplinary Board of the Supreme Court of PA. (dh)

Mar. 23 Letter (Clerk) to Prothonotary of the Supreme Court of PA, requesting a copy of above report. (dh)

Mar. 29 Order (Sloviter, ' Greenberg, Garth, CJ) granting hearing to take place on May 30, 1990 at 3:00 p.m. on 19th Fl. of the U.S. Courthouse. Further ordered, at hearing, Court will not reexamine finding of Supreme Court of PA, And Clerk shall mail copy of this order toFrank J. Marcone at least 30 days prior to hearing, and Mr. Marcone, on or before May 18, 1990, will file an acknowledgment of receipt of order,and he or his attorney may file a preheating memo not to exceed 30 pages. (dh)

Mar 29 Cert. copy of above order to Frank J. Marcone. (dh)

Apr Report and Recommendation of the Disciplinary Board of

the Supreme Court of Pennsylvania received from the Chief Clerk of that Court (ih)

Apr 2 Copy of above Report to Standing Committee. (dh)

Apr 3 Letter (Frank J. Marcone, Esquire) acknowledging receipt of the

March 29, 1990 Order.Form A.0. 147* (luty 1953)

MISCELLANEOUS RECORD

UNITED STATES COURT OF APPEALS
FOR THE
THIRD CIRCUIT PAGE TWO

CASE NO. 89-8079 In the Matter of FRANK J. MARCONE

DATE FILINGS-PROCEEDINGS

1990

Apr 10 Memo (Greenberg) directing Clerk's office to send letter to Frank J. Marcone advising him that it's not the Court's intention to appoint an attorney in support of the order to show cause. Furthermore, the documents the Court has obtained in it's investigation are the order of the Supreme Court of Pennsylvania dated October 11, 1989, memorandum and order of the U.S. Disti Court dated November 30, 1989 and the Report and Recommendation of the Disciplinary Board o the Supreme Court of Pennsylvania dated June 16, 1989.

Apr 10 Letter to Frank J. Marcone as directed in above memo.(dh)

May 30 Hearing on Attorney Disciplinary Enforcement.

Coram: Sloviter, Greenberg and Garth, CJ, Greenberg, CJ, presiding. A. Charles Peruto, Sr., Esquire appeared for Mr. Marcone. Committee directed the following be marked and place into evidence: Exhibit I - Report and Recommendation of the Disciplinary Committee of the PA Supreme Court; Exhibit 2 - Decision of the Supreme Court of Pennsylvania; Exhibit 3 - Memorandum and Order of Judge Fullam. (dh)

May 30 Tape of hearing received. (dh)

June 8 Report & Recommendation of the Standing Committee on Attorney Discipline recommending that Frank J. Marcone, Esquire be suspended from the Bar of th Court for four years commencing October 11, 1989 and until reinstated in ac ance with Disciplinary Rule 12, but if reinstated before the expiration of four years by the Supreme Court of Pennsylvania, that he be permitted to ap for reinstatement to the Bar of this Court.

June 8 Notice (Clerk) to A. Charles Peruto, Esquire, attorney for Frank J. Marcone, advising that above Recommendation submitted to the active members of this Court who will make the determination as to what discipline, if any, should Imposed. Under Rule 10 of the Disciplinary Rules, Mr. Marcone may file exceptions to the Report & Recommendation within 20 days, which will be submitted, to the active judges. Further, the Standing Committe does not propose sending copy of Report and Recommendation of the Disciplinary Board of the Supreme Court of Pennsylvania dated June 16, 1989 to the active judge of this Court, but will do so if requested within 20 days.(dh)

July 12 Copy of order dated July 11, 1990 received from

U.S.D.C. for the Eastern Dist of Pennsylvania denying Mr. Marcones motion for readmission to the Bar of t Court . (dh)

July 19 Copy of above order to Standing Committee on Attorney Discipline.(dh)

July 23 Application by Frank J. Marcone, Esq. for reinstatement to the Bar of this Co No action to be taken.

Aug 10 Clerk's letter to Frank J. Marcone, Esq. written at the direction to the Cour advising that this Court has not acted on the Report and Recommendation of th Standing Committee; that he is not under suspension and that he should advise Clerk promptly when the Pennsylvania proceedings are completed.

Nov 5 Letter dated 11/l/90 form Frank J. Marcone, Esq. advising PA Supreme Court va their 10/11/89 suspension order, set the matter for rehearing and that since not suspended he is actively practicing in various Courts in Pennsylvania, and Florida.

CONTINUED ----------

Nov 5 Attorney disciplinary proceedings closed. (8/12/98 - REOPENED)

DATE FILINGS-PROCEEDINGS Filed

Order to snow Cause

Aug. 12 Order (Sloviter, Greenberg and Cowen, Circuit Judges) directing that Frank J. Marcone

show cause in writing, within 30 days, why he should not be suspended from the bar of this court for a period of four years, commencing upon the date of the order of suspension of this court and until such time as he is reinstated to the practice of law by the Supreme Court of Penna., which ever is later, and until the further order of this court;

It is Further Ordered that Frank J. Marcone complete and return to the Clerk of this Court, within 30 days, a declaration of the names and addresses of the other bars to which he is admitted using the form supplied by the Clerk; aid It is Further Ordered that the Clerk shall send a copy of this order to Frank J. Marcone by certified mail, return receipt requested.(bir)

Aug. 12 Copy of above Order mailed Certified Mail Return Receipt Requested (P-424-923-265) to Frank J.Marcone, Esquire.(bir)

Aug 12 Copy of Declaration form mailed with above Order to Frank J. Marcone.

Sept. 1 Response to the Rule to Show Cause received from Frank J. Marcone. (bjr)

Sept. 1. Motion for Hearing before the Standing Committee on Attorney Discipline received from Frank J. Marcone, Esquire. (bjr)

Sept 11 Letter to Frank J. Marcone written at the direction of the Standing Committee advising the Committee requests that Frank Marcone advise it

through the Clerk's office whether he will agree to a hearing on October 5. If not the Committee will fix a later hearing date. (bjr)

Sept. 21 Letter dated September 16, 1998 received from Frank J. Marcone requesting that the hearing be scheduled for a time later than the October 5, 1998 date. Further, considering that he has yet to find adequate counsel, air. Marcone requests that this matter be continued for at least 60 days. (bjr) ,pt 28 Letter written to Frank J. Marcone at the direction of the Standing Committee on Attorney Discipline advising that the hearing will be held during the week of December 14, 1998. The exact time will be determined later.- This letter should give you adequate notice. (bjr

Nov. 30 Letter dated November 30, 1998 written to Mr. Marcone at the direction of the Standing Committee advising that the Committee will hold a hearing as requested by Mr. Marcone at 2:30 p.m. Thursday, December 17, 1998. Confirmation that he will be present for the be due from Mr. Marcone in this office no later than December 10, 1998. (bir)

Dec 4 Letter dated December 4, 1998 received from Frank Marcone, Esq-.- requesting a continuance of the December 17th hearing date. Mr. Marcone also requested information concerning what he will be permitted to produce by way of evidence before the Standing Committee, 'etc.

Dec 8 Letter dated December 8, 1998 written at the direction of the Standing Committee postpoing the December 17th Hearing to a date to be set after the Dec. 14th hearing in the Eastern Dist. of Penna. Mr. Marcone is directed to advise the

Committee by sending to the Clerk's office an original and (4) copies of a letter upon completion of his trial in the Eastern Dist of Penna. and which should state the disposition of that trial

UNITED STATES COURT OF APPEALS
FOR THE
THIRD CIRCUIT

PAGE THREE
CASE NO.
89-8079 In the Matter of Frank J. Marcone
DATE FILINGS-PROCEEDINGS
Filed-1999

Mar 8 Copy of letter dated March 8, 1999 received from Frank J.Marcone, Esquire.

Jun 4 Order to Show Cause (Clerk) directing that Mr. Marcone show cause within thirtv days of the date of this order why he should not be subject to the presumed disbarment provided for in Rules 3.1 and 7.2 of-the United States Third Circuit Court of Appeals Rules of Attorney Disciplinary Enforcement. It is Eurther directed that in accordance with Rule 8.1 of the U.S. Third Circuit Court of Appeals Rules of Attorney Disciplinary Enforcement the coutys Attorney Disciplinary Committee may summarily suspend Mr. Marcone privilege to practice before this Court. Copies of the District Court's Finding of Guilt and Revised Finding of Guilt are attached to this,Order and made a oart thereof.

Jun 4 Above Order to Mr. Marcone sent Certified Mail Return Receipt Requested

Jun 1 Petition to Vacate a Summary Suspension and Response to the Rule to Show Cause received from

Mr. Marcone.

Jun 21 Order (Sloviter, Greenberg and Cowen, Circuit Judges) scheduling the hearing on the order to Show Cause on Thursday, July 22, 1999 at 10:00 a.m. before the Committee on Attorney Discipline in the U.S. Courthouse, 601 Market Street, Phila., PA 19106. Mr. Marcone is directed to be present with any evidence he seeks to proffer as to the entry of an order of reciprocal suspension..

The federal proceedings are not relevant to that issue and will not be considered at the hearing.

Jun 21 Order Sur Petition to Vacate a Summary Suspension (Sloviter, Greenberg and Cowen, Circuit Judges, Committee on Attorney Discipline) Mr. Marcone is directed to file a response to the Order to Show Cause within thirty (30) days of the date of his sentencing by the District Court- The Petition to Vacate is DENIED.

Jun 21 Orders of June 21, 1999 sent via Certified Mail Return Receipt Requested an via Regular Mail (Z 598-744-406)

Jun 24 Petition to Vacate A Summary Suspension and Motion to Clarify Order received from Mr. Marcone.

Jun 30 Order (Sloviter, Greenberg and Cowen, Circuit Judges, Committee on Attorney Discipline Denying Motions to Vacate a Summary Suspension and also for a clarification of an Order dated June 22, 1999, because it is clear that Frank J. Marcone has not been suspended as was set forth explicitly in this court's order entitled Order-Sur Petition to Vacate a Summary Suspension June 21, 1999. Consequently, there is no summary suspension to vacate as the

order dated June 4, 1999 did not suspend Frank J. Marcone, summarily or otherwise and neither the order of this court scheduling the hearing on July 22, 1999 nor Order Sur Petition to Vacate a Summary Suspension require clarification. The hearing will proceed on July 22, 1999 as scheduled.

Continued -------



DATE FILINGS-PROCEEDINGS
Filed

Jul 22 Supplemental Response to the Rule to show Cause received from Mr. Marcone.

Jul 20 Respondent's Facts, Memorandum of Law and Discussion in Support of Terminating further Discipline received from Mr. Marcone.

Jul 20 Respondent's Appendix of documents in support of Respondent's Facts, Memorandum of Law and Discussion in Support of Terminating further discipline.

Jul 22 Hearing held on Order to Show Cause (Sloviter, Greenberg and Cowen, Circuit Judges)

Sept 7 NOTICE OF REPORT AND RECOMMENDATOIN,

(Clerk) advising that the Standing Committee proposes to submit the attached Report and Recommendation to the active members of this court. Advising Mr. Marcone that pursuant to Rule 10.3 of the -Rules of Disciplinary Enforcement he may file exceptions with the undersigned L report within 20 days of the date of the report which shall be deemed the same as the date of this notice. etc.

Sept 7 REPORT AND RECOMMENDATION OF THE STANDING COMMITTEE ON ATTORNEY DISCIPLINE
(Before: Sloviter, Greenberg and Cowen, Circuit Judges)

Sept 20 Request for Reconsideration of the Report and Recommendation in the Alternative Request for Extension of Time in which to file exceptions, received from Mr. Marcone

Sept 27 Order (Sloviter, Greenberg and Cowen, Circuit Judges) Denying request for reconsideration of the Report and Recommendation. Granting 30-day extension to file exceptions.

Sept. 28 Appearance of Robert D. Greenbaum, Esquire on behalf of Frank J. Marcone.

Oct 19 Letter dated October 18, 1999 received from Robert D. Greenbaum, Esquire addressed to Judge Becker.

Oct 27 Exceptions to the Report and Recommendation of the Standing Committee on Attorney Discipline rec'd-fr6m counsel for Mr. Marcone, Robert D. Greenbaum, Esquire.

Nov 26 Order (Becker, Chief Judge, Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Alito Roth, McKee

and Barry, Circuit Judges) APPROVED and ADOPTED the Report and Recommendation of the Standing Committee on Attorney Discipline. Chief Judge Becker notes his dissent. Pursuant to the Report and Recommendation, Frank J. Marcone, Esqurie is hereby suspended from the Bar of this Court, for a period of four years from the date of this Order and until such time as he is reinstated to practice law by the Supreme Court of Pennsylvania, whichever is later.

GENERAL DOCKET FOR
Third Circuit Court of Appeals

Court of Appeals Docket #: 99-1842
Filed:
10/26/99

Nsuit: 0
USA v. Marcone
Appeal from: Eastern District of Pennsylvania

---------- Lower court information:
District: 0313-2 : 98-cr-00544
Trial Judge: Roderick R. McKelvie, District Judge
Date Filed: 10/8/98
Date order/judgment: 10/18/99
Date NOA filed: 10/8/99
---------- Fee status: paid
Prior cases:
None
Current cases:
None
Docket as of February 4, 2000 12:49 pm Page 1

CLOSED
Proceedings include all events.
99-1842 USA v. Marcone

UNITED STATES OF AMERICA

Joan L. Markman
Appellee
FAX 861-8502
215-861-8516
Suite 1250
Office of United States Attorney
615 Chestnut Street
Philadelphia, PA 19106

v

Frank J. Marcone

Stephen P. Patrizio
Appellant
FAX 569-2042

215-569-2121
Dranoff & Patrizio
117 South 17th Street
Architects Building, Suite 1600
Philadelphia, PA 19103


SUBM. EXP
rmg CLOSED

Proceedings include all events.
99-1842 USA v. Marcone

10/26/99 Criminal Case Docketed. Notice filed by Frank J. Marcone. (rmg)

10/26/99 MOTION by Appellant for bail pending appeal and Motion by Appellant to expedite appeal, with proposed briefing schedule, filed. Answer due 10/27/99. Certificate of dated 10/25/99. (rmg)

10/28/99 RESPONSE by USA to motion for bail pending appeal and for expedited appeal. Certificate of service dated 10/28/99. (rmg)

11/1/99 REPLY by Appellant to the Government's response to the Appellant's motion for bail and ex edited appeal, filed. Certificate of service dated 10/30@99. (rmg)

11/1/99 APPEARANCE from Attorney Joan L. Markman on behalf of Appellee USA, filed. (rmg)

11/4/99 ORDER (Nygaard, Alito and Garth, Circuit Judges) granting motion for bail pending appeal and motion for an expedited appeal, filed. E-6-E (rmg)

11/4/99 Certified copy of Order sent to Clerk of District Court. (r'mg)

11/9/99 CALENDARED for Thursday, December 16, 1999. (mac)

11/19/99 APPEARANCE from Attorney Stephen P. Patrizio on behalf of Appellant Frank J. Marcone, filed. (lrb)

11/19/99 MOTION by Appellant Frank J. Marcone to file brief out of time and to file brief in excess of 14,000 words, filed. Answer due 12/2/99. Certificate of Service dated 11/19/99. (lrb)

11/22/99 Notice of telephone request. Counsel for the appellant was warned that any footnotes should be printed in the same font size as the text of the brief. Counsel was requested to submit an addendum to include a statement of related cases, a copy of the order being appealed and a copy of the notice of appeal. The covers should be white.a Response due in 3 days. (lrb)

11/22/99 MOTION b Appellee USA for extension of time to file brief until 12@6799, filed. Answer due 11/22. Certificate of Service dated 11/22/99. (rmg)

11/24/99 COMPLIANCE RECEIVED from Stephen Patrizio with corrections to the brief. (gas)

11/24/99 ADDENDUM to the Appellant's Brief, filed. (gas)

Docket as of February 4, 2000 12:49 pm Page
4 SUBM. EXP
rmg CLOSED
Proceedings include all events.
99-1842 USA v. Marcone

11/26/99 ORDER (Mansmann, Authoring Judge, Greenberg and McKee, Circuit Judges) motion for extension of time to file brief by Appellee USA from 12/2/99 to 12/6/99 is granted, filed. (par)

12/2/99 ORDER (Mansmann, Authoring Judge, Greenberg and McKee, Circuit Judges) granting motion to file brief out of time and to file brief in excess of 14,000 words by Appellant Frank J. Marcone, filed. (lrb)

12/2/99 BRIEF on behalf of Appellant Frank J. Marcone, Pages: 50, Copies: 10, Delivered by mail, filed. Certificate of service date 11/18/99. (lrb)

12/2/99 APPENDIX on behalf of Appellant Frank J. Marcone Copies: 4 Volumes: 1, Delivered by mail, filed. Certificate of service date 11/18/99. (lrb)

12/6/99 MOTION by Appellee USA to file a brief in excess of the word limit, filed. Answer due 12/20/99. Certificate of Service dated 12/6/99. (lrb)

12/6/99 SUPPLEMENTAL APPENDIX on behalf of USA. Copies: 3 Volumes: 1 Delivered by mail, filed. Certificate of service date 12/8/99. (lrb)

12/6/99 PRESENTENCE REPORT (4 ccs) received. [UNDER SEAL] SEND TO MERITS PANEL (lrb)

12/7/99 Notice of telephone request. Requested new briefs from appellee. The appellee is required to submitt an original and 5 copies of the brief without the presentence report, with red backs; an additional copy of the appendix and an addendum to include the statement of related cases. Response due in 3 days. (lrb)

12/7/99 COMPLIANCE RECEIVED for appellee's brief and appendix. (lrb)

12/7/99 ADDENDUM to brief of appellees, filed. (lrb)

12/9/99 MOTION by Appellant Frank J. Marcone to Recuse and Either Re-appoint a suitable panel or refer to another Circuit, filed. Certificate of Service dated 12/9/99. (rmg)

12/10/99 RESPONSE filed by Appellee in Opposition to the motion to recuse. Certificate of service dated 12/10/99. (awi)

12/14/99 MOTION by Frank J. Marcone for admission in pro se status, filed. Answer due 12/24/99. Service by hand delivery on 12/14/99. (rmg)



SUBM. EXP
rmg CLOSEDProceedings include all events.
99-1842 USA v. Marcone

12/15/99 Copy of Document forwarded to the Supreme Court by Appellant Frank Marcone entitled "application for a stay of proceedings in the Third Circuit Court of Appeals in Third Circuit appeal number 99-184211, sent for the Court's information, received. (rmg)

12/16/99 SUBMITTED Thursday, December 16, 1999 Coram: Mansmann, Greenberg and McKee, Circuit Judges. (cg)

12/16/99 MOTION by Appellant Marcone for a stay of proceedings in the form of a motion for stay of all proceedings, filed. (rmg)

12/17/99 Notice of telephone request. Requested 2 additional copies of the appellant's supplemental

appendix. Response due in 3 days. (lrb)

12/17/99 Notice of telephone request. Requested a motion to file supplemental appendix from appellant. The appellant was warned about the use of grey covers on reply briefs. Response due in 3 days. (lrb)

12/20/99 ORDER (Becker, Authoring Judge and Chief Judge, Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee, and Barry, Circuit Judges) denying Mr. Marcone's request to recuse and either reappoint a suitable panel or refer to another circuit in Misc. No. 89-8079, filed. (rmg)

12/20/99 MOTION by Appellant Frank J. Marcone to file supplemental appendix, filed. Answer due 12/30/99. Certificate of Service dated 12/20/99. (lrb)

12/20/99 COMPLIANCE RECEIVED for supplemental appendix by appellant. (lrb)

12/21/99 RESPONSE filed by Appellee USA to appellant's motion to file supplemental appendix. Certificate of service dated 12/21/99. (lrb)

12/22/99 ORDER (Mansmann, Greenberg, Authoring Judge, McKee, Circuit Judges) denying Mr. Marcone's motion entitled "Application for Stay of all Proceedings in the Form of a Motion for Stay of all Proceedings", filed. (rmg)

12/22/99 CORRECTED ORDER Reflecting the General Docket No. 99-1842 (Becker, Authoring Judge, Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee, Barry, Circuit Judges) denying appellant's motion to recuse and either reappoint a suitable panel or refer to another circuit, filed. (rmg)

12/22/99 ORDER (Mansmann, Greenberg and McKee, Circuit Judges) granting motion by Frank J. Marcone for admission in pro se status, filed. (rmg)



Proceedings include all events.
99-1842 USA v. Marcone

12/23/99 CLERK'S LETTER to counsel written at the direction of the Court. The court notes that in responding to the motion to file a supplemental appendix the government has contended that three items in the proposed appendix do not appear in the record. The court directs that you file a letter memorandum on or before December 28, 1999, (with service on the government attorneys) responding to the government's contention and, if you claim that the items are in the record indicating where. The court is addressing the letter directly to Mr. Marcone as he filed the motion to supplement the appendix pro se. Response due by 12/28/99. (mac)

12/27/99 ANSWER and Certificate of Service dated

12/27/99, received in accordance with the Court's request from Appellant Frank
J. Marcone, filed. (cg)

1/7/00 Letter dated 12/29/99 from the Supreme Court advising that Mr. Marcone's application for stay was denied by them on 12/29/99. (rmg)

1/11/00 NOT-PRECEDENTIAL PER CURIAM OPINION (Mansmann, Greenberg, and McKee, Circuit Judges), filed. Total # Pages 7. (rmg)

1/11/00 JUDGMENT, affirmed, filed. (rmg)

1/13/00 ORDER (Mansmann, Greenberg, Authoring Judge and McKee, Circuit Judges) granting motion to file supplemental appendix by Appellant Frank J. Marcone, except as to the items on page 8, the Savell note, page 11, the Argis memorandum, and pages 12 and 13, the Bechtelheimer memorandum. As to those items, it is denied. Neither the delivering of the matierials to the court before the trial nor mere reference to them at trial makes them part of the record, filed. (lrb)

1/13/00 SUPPLEMENTAL APPENDIX on behalf of Frank J. Marcone. Copies: 4 Volumes: 1 Delivered by hand, filed. Certificate of service date 12/14/99. (lrb)

1/13/00 REPLY BRIEF by Pro Se Appellant Frank J. Marcone, Copies: 10, Delivered by hand, filed. Certificate of date 12/14/99. (lrb)

1/13/00 ORDER (Mansmann, Greenberg, Authoring Judge and McKee, Circuit Judges) granting motion by Appellee USA to file brief in excess of 14,000 words, filed. (lrb)

1/13/00 BRIEF on behalf of Appellee USA, Pages: 66, Copies: 10, Delivered by mail, filed. Certificate of Service date 12/7/99. (lrb)

2/4/00 MANDATE ISSUED, filed. (rmg)



I . SUBM. EXP
rmg CLOSED
Proceedings include all events.
99-1842 USA v. Marcone

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
P. DOUGLAS SISK
CLERK
Telephone
215 597-2995
December 1, 1999

Stephen P. Patrizio, Esq.
Joan L. Markman, Esq.

Re: United States of America v. Frank J. Marcone, Appellant
No. 99-1842
Dear Counsel:

The Court has directed me to advise you that the above-entitled case (s) will be submitted on briefs on Thursday, December 16, 1999, pursuant to 3rd Cir. LAR 34.1 (a).

Since there will be no oral argument, your presence will not be required.

Very truly yours,
P. DOUGLAS SISK,
Clerk

By: *Carol L. Gillin/ mac*
Carol L. Gillin,

Calendaring Clerk

Direct Dial: (215) 597

3130
PDS:clg
Pursuant to IOP Chapter 2 you are hereby advised that your appeal will be submitted before the following panel: MANSMANN, GREENBERG and McKEE, Circuit Judges.

GENERAL DOCKET FOR
Third Circuit Court of Appeals
Court of Appeals Docket #: 98-1079
Nsuit: 3999 Miscellaneous
In Re: Marcone v.
Appeal from: Eastern District of Pennsylvania

- - - - Lower court information:
District: 0313-2 : 95-mc-00071
Trial Judge: Edward N. Cahn, Chief Judge
Date Filed: 3/16/95
Date order/judgment: 1/22/98
Date NOA filed: 1/28/98
- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - Fee status: paid
Prior cases: None
Current cases: None
Filed: 2/19/98
Docket as of January 28, 2000 11:38 am
98-1079 In Re: Marcone v.

2/19/98 CIVIL CASE DOCKETED. Notice filed by Frank J. Marcone. (awi)

2/19/98 TRANSCRIPT PURCHASE ORDER (Part I), already on file in the District Court Clerk's Office, filed. (awi)

2/19/98 CERTIFIED LIST filed. (awi)

2/19/98 BRIEFING NOTICE ISSUED. Appellant's brief and appendix due 3/31/98. (awi)

3/6/98 FOLLOW UP LETTER to Frank J. Marcone requesting the following documents: **Appearance Form **Disclosure Statement **Information Statement (awi)

4/6/98 MOTION filed by Appellant to file brief and appendix out of time. (par)

4/7/98 Notice of telephone request of Frank J. Marcone to submit new covers for brief. Due three days. Response due in 3 days. (par)

4/7/98 COPY OF DECISION/ORDER of District Court dated 5/7/97 referring matter of reinstatement to bar of the DC Court to a panel of DC Judges, filed. (awi)

4/7/98 COPY OF DECISION/ORDER of District Court dated 6/25/97 denying petition for immediate reinstatement to practice law in the DC Court, filed. (awi)

4/7/98 COPY OF DECISION/ORDER of District Court dated 12/3/97 denying motion by Appellant for reinstatement to the bar of the DC Court, filed. (awi)

4/8/98 COPY OF Dissent by District Judge Dalzell to the denial of the petition for reinstatement, filed. (awi)

4/8/98 COPY OF DECISION/ORDER of District Court dated 1/22/98 denying petition by Appellant for reinstatement, filed. (awi)

4/8/98 COMPLIANCE of new covers for brief, RECEIVED. (par)

4/15/98 APPEARANCE from Attorney Frank J. Marcone on behalf of Appellant Frank J. Marcone, filed. (par)

4/15/98 DISCLOSURE STATEMENT on behalf of Appellant Frank J. marcone, filed. (par)

4/15/98 INFORMATION STATEMENT on behalf of Appellant Frank J. marcone, received. (par)

4/20/98 ORDER (Clerk) granting motion to file brief and appendix out of time by Appellant Frank J. Marcone, with filing as of the date of this order, filed. (par)

4/20/98 BRIEF on behalf of Appellant Frank J. Marcone , Pages: 31, Copies:10, Delivered by hand, filed. No service.

4/20/98 APPENDIX on behalf of Appellant Frank J. Marcone Copies: 4 Volumes: 1, Delivered by hand, filed. No service. (par)

4/21/98 LIST APPELLANTS BRIEF ONLY. (awi)

6/8/98 CALENDARED for Monday, July 27, 1998. (pl)

7/27/98 SUBMITTED Monday, July 27, 1998 Coram: Greenberg, Scirica, and McKee, Circuit Judges. (cg)

7/29/98 MEMORANDUM OPINION (Greenberg, Authoring Judge, Scirica and McKee, Circuit Judges), filed. Total MO Pages: 2. (ghb)

7/29/98 JUDGMENT: AFFIRMED, filed. (ghb)

8/20/98 MANDATE ISSUED, filed. (awi)

8/20/98 RECORD released. (awi)

IN THE UNITED STATES COURT OF APPEALS
FOR THE
THIRD CIRCUIT

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UNITED STATES OF AMERICA APPEAL
NUMBER 1842 OF 1999
APPEAL FROM
A
JUDGMENT OF
CONVICTION IN
FRANK MARCONE 98CR544-1 IN
THE EASTERN
DISTRICT COURT OF
PENNSYLVANIA October 6, 1999

APPLICATION FOR A STAY OF
PROCEEDINGS
IN THE FORM OF A
MOTION FOR STAY OF ALL PROCEEDINGS

TO THE HONORABLE, THE JUDGES OF THE THIRD CIRCUIT COURT OF APPEALS

Frank J. Marcone, Esquire, files this Application for a Stay in the form of a Motion to Stay all Proceedings in the above captioned case and in support of his Application for a Stay, he avers the following:

1.The above captioned case is being submitted to a Panel of Judges without Argument on December 16, 1999.

2.The Appellant, Frank J. Marcone, Esquire, has filed the "Appellant's Motion to Recuse and Either Reappoint a Suitable Panel or Refer to Another Circuit with the Clerk of the Third Circuit Court of Appeals on December 8, 1999 and

has requested the Court enter an immediate Order Recusing the Panel to whom the case is being submitted.

3. The Third Circuit Court of Appeals has not acted upon the Appellant's Motion to Recuse and Either Reappoint a Suitable Panel or Refer to Another Circuit and today, December 16, 1999, the Panel who is being requested to recuse will be receiving the case for decision.

4.That a failure to act upon the Motion to Recuse above mentioned is tantamount to a denial of the Motion and without a Stay, the Panel who has been objected to will consider the issues and the Appellant may be irrevocably injured as a result of an adverse decision.

5.That the Appellant is entitled to a fair consideration of the issues contained in the Motion to Recuse and for the Court to consider the issues raised in the aforesaid Motion.

6.The Appellant has sought relief by filing the attached APPLICATION FOR A STAY OF PROCEEDINGS IN THE THIRD CIRCUIT COURT OF APPEALS, a copy of the same being attached hereto.

7.The Clerk of the United States Supreme Court has communicated with the Clerk of the Third Circuit Court of Appeals and has explained to the Appellant that no action may be taken by the United States Supreme Court unless a specific Application to Stay or a Motion to Stay the proceedings in the Third Circuit is first filed in the Third. Circuit Court of Appeals.

8.This is the Motion which the Appellant has prepared and is filing in his behalf in an effort to have either

the Third Circuit Court of Appeals respond to the Motion to Recuse which asked for "Immediate recusal" in the prayer of the Motion and for alternative relief thereafter.

9. The Appellant incorporates by reference the allegations contained in the attached Application For A Stay of Proceedings In The Third Circuit Court of Appeals in Third Circuit Appeal Number 99-1842 and the attachments to said Pleading, including the Motion filed in the Third Circuit requesting immediate recusal and alterative relief thereafter.

WHEREFORE, the Appellant respectfully prays the Judges of the Third Circuit Court of Appeals respond immediately and determine if relief will be granted by way of recusal and that in the interim, a Stay be Ordered in the nkd Circuit Court of Appeals until a decision is reached in the outstanding Motions to Recuse the Third Circuit Court of Appeals in part and alternatively to Refer this Appeal to another Circuit for consideration.

Respectfully submitted,

*Frank J. Marcone*

Frank J. Marcone, Esquire
2530 North Providence Road
Upper Providence, Pennsylvania 19063

(610) 565 3241
Appellant, pro se.

December 16,1999

CERTIFICATE OF SERVICE

Frank J. Marcone, Esquire, Appellant, pro se, does hereby certify that he has directed a copy of the Attached Application for A Stay in the Form of a Motion for a Stay to the following:

Joan L. Markmann, Esquire
Assistant United States Attorney
615 Chestnut Street
Suite 1250
Philadelphia, Pennsyivania
19106

Stephen P. Patrizio, Esquire
117 South 17'hStreet
Suite 1600
Philadelphia, Pennsylvania
19103

Clerk of the United States Supreme Court
I First Street, N.E.
Washington, D.C. 20543

*Frank J. Marcone*

December 16, 1999

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

| | | | |
|---|---|---|---|
| UNITED STATES OF AMERICA, | | : | Criminal Action |
| | Plaintiff, | : | |
| v. | | : | |
| FRANK MARCONE, | | : | |
| | Defendant. | : | No. 98-544 |

- - -

Wilmington, Delaware
Thursday, February 19, 1999
EXCERPTED TRANSCRIPT

- - -

BEFORE: HONORABLE RODERICK R. McKELVIE, U.S.D.C.J.

- - -

APPEARANCES:

JOAN L. MARKMAN, ESQ.
Assistant United States Attorney
(Philadelphia, PA)

Counsel for Government

JOSEPH M. FIORAVANTI, ESQ., and
ARTHUR T. DONATO, JR., ESQ.
(Media, PA)

Counsel for Defendant

THE COURT: Let me talk for a couple of minutes.

What I think I will do is, *let me* walk through some of the factual issues there are and *tell you what conclusions I would draw from those facts*, then we can talk about the legal significance of the conclusions.

As I understand it, from the back-and-forth, there is actually not all that much disagreement about facts. There is disagreement about what the facts mean, in terms of intent and purpose. And then there is a disagreement about what the significance is of the facts in terms of showing willfulness.

On the issue of the other years, I am not sure they are all that legally significant to me. That is, I am not sure I need to look at them one way or the other to make judgments. To the extent that I have looked at them, they really tend to confirm pattern of facts that fall within the years in issue. That is, I don't think they tell me anything different one way or the other.

I am not saying that for anything other than to say, put those aside, because I don't rely on them in my mind

to make a judgment about what is going on here.

And in the conferences before the trial, we talked about issues of competence and defendant's mental state. I understand a lot of these facts maybe really do shed light on his competence and mental state. But understand that he is not making an affirmative defense of lack of capacity to form the intent.

These facts do show me, without regard to the legal standard and without regard to the term willfulness, they show me he didn't want to file his tax returns. Whether it is didn't want to file in the same way that we see people we deal with in every-day life who just don't want to face up to their obligations and don't want to get it done when theoretically we expect them to get it done, or they just didn't want to get it done, I am not sure.

And I understand the argument that you all go back and forth with is, if he didn't want to file them, does that mean he had an intent not to file them? We can go on for hours with you two back and forth with that, I take it.

Did he form an intent not to file the returns and was it willful?

Which comes down I think in the end, what we are going to talk about is sort of community expectations about it.

On Savell, I have a bunch of comments. The testimony relating to him shows a number of things which I expect we could probably agree on. One is, it shows that Mr. Marcone had knowledge of the duty to file the

returns, which we would have expected in any event, because he is an attorney. They showed he made some effort, made some efforts to take those steps necessary to see that returns would be filed, gathering information, had communications, went back and forth. That may be the type of efforts that we would characterize as *negligent or insufficient, but they are evidence to show some intent, some effort to carry it out.*

I know there is an argument that once he makes the effort, the responsibility or duty to file shifts to Savell. And I don't accept that. I don't accept the idea that Savell had any duty. I am sympathetic to Savell's position of this is your problem, don't put it in my lap by giving me half-solutions.

And actually, the document III-21, the 1992 summary, I think is one of the most significant documents, because it tends to show a little bit of everything about what is going on in the case, which is *a legitimate effort by Marcone to gather information and to submit it to somebody.* On the other hand, for the accountant, it is a bit of a nightmare, because it includes all kinds of information that appears to be irrelevant and confusing.

So I am sympathetic to Savell saying, I don't know what this means, I don't know what I can do with it, although I know everybody was a little interested to hear the witnesses confirm that the letters, repeated letters that went out were a way to sort of protect him from liability. I can understand that. That is, professionals in a situation where somebody says, here, you take the ball, and he says, I really don't have the whole ball.

So I don't see the dance with Savell as being a charade and I don't see it -- *I don't see what went on with Savell as evidence of evil intent by the defendant. I do see it as confirming a pattern of what appears to be irresponsible or negligent behavior on his part in terms of attempting to meet his duty.* But again, not evidence of fault by Savell.

So then, the question is, if we have a pattern of facts that show some effort by the defendant to meet his obligation, *are those facts sufficient to rebut a conclusion of willful intent?* The pattern of facts that we have seen shows, he was aware of the duty. He made some efforts to try to meet his obligations. He didn't appear to be defiant in failing to meet his obligations, defiant in the sense of I am not going to do it, you know I am not going to do it. But they also show an apparent inability on his part to carry through on what his obligations are.

And as I mentioned, a significant example of that is III-21, which is the summary that I understand the accountants say, you give me the deposits and I will file an estimated return. But that, to me, falls under the category of shifting to the accountant the responsibility for carrying through a duty that the client had rather than the accountant.

I guess the second example of evidence of inability to carry through is when the government went to get the order to show cause, which I understand, in some ways, is evidence of knowledge and duty. But I think we all agree, he knew he had the duty. And even the hammer of the order to show cause didn't seem to get the results that they should

have gotten.

What we have is a, but *pattern of facts of a person who appears to be disorganized, could be recalcitrant doesn't appear to be -- may well be unstable*, but is in this context unable, apparently unable to come up with sufficient facts to show that he was incompetent and lacked the mental capacity.

So that says, now, what does the law tell us about a pattern of facts like that in terms of our expectations for individuals in the community?

I would conclude that the community would say, in that context, those facts are sufficient to show willful intent not to file the tax returns.

But what I would typically do in a situation like this is say, all right, we have got that pattern of facts, we don't need to argue anymore about conclusions, I don't think we need to argue about conclusions I would draw from those facts.

Let's see how other Courts have dealt in situations with defendants who appear and say, all right, Judge, here is what I am, here is what I did, does that add up to willful intent or not? If the defendant can't show me case law that says in that context with those facts that that conduct is not willful, then I am inclined to find it is willful.

So what I would do would be to say, that is how I evaluate the facts. That is the conclusion I would reach. I don't mind stopping and reading some case law to say, Judge, that conclusion is inconsistent with how other Courts have read similar patterns of facts and therefore you should draw

a different conclusion.

The difference between the case law we have talked about, that is, the quotes that we have talked about so far, is that I don't think -- I will go back and re-read Goldstein again -- but I don't think they sit on top of the same pattern of facts. They have certain principles, certain things you look for, certain indicators you look to. But they don't have a person like the defendant whose behavior pattern fits within this. *They don't have that pattern, they don't have Judges drawing the conclusion that that pattern is evidence of lack of willfulness.*

*It is evidence of behavior that we all see every day in the community of individuals who just have an inability to be home at 5:00 and all other little patterns of behavior like that that they are just unable to carry through.*

MR. FIORAVANTI: May I just say a few things in response, Your Honor?

THE COURT: Fine.

MR. FIORAVANTI: I thought I heard Your Honor say that you were prepared to reach the conclusion that this was a man who despite some good-faith efforts was unable to get it done, essentially. If I can change that into the language that I see sprinkled in these opinions, which the Courts have *labeled gross negligence, or procrastination, as not being*

*enough* --

THE COURT: Well --

MR. FIORAVANTI: That is the kind of argument I would urge on Your Honor. And I would also say to the Court *that Your Honor talked at one point about the shifting of burdens.* I never intended to prove that Savell was at fault here. I merely raised all those issues to show that interplay between the two men, to show a reasonable doubt about intent. That was the only purpose of it. I didn't intend to prove Gene Savell was guilty of malpractice, that is number one.

Number two, we had some dialogue, and you are right, pretrial, about the possibility of Dr. Fink testifying. Counsel made a judgment based upon the evidence in the case to abandon that and proceed on the facts bracketed by the time period that I have been harping about throughout this argument, and mentioned in my opening.

That is what I am attempting to do here. Not to prove that my client is mentally infirm, or to prove that Mr. Savell was guilty of malpractice, but simply to prove

that
these events, in the relevant time frame, if they do nothing
else, they surely raise a reasonable doubt about whether my
client acted deliberately to not file his returns. Indeed,
unless he was participating in a ruse, which Your Honor has
found he was not, then he was making the effort to get
there. Something which happened late, which ultimately
occurred, and which was accurately done when filed a year and a half
before the indictment. And the delay is a result, as
I understand Your Honor, of gross negligence, not of
deliberate intention.
THE COURT: Well, where I am is, I am prepared to
make a finding, based on what I have seen of the facts, to
say that they lead to the conclusion that this is willfulness
in the context of my understanding of the law. And in order
to confirm that, or to show me that I am incorrect, what I
need to see is case law not where there is a quote or a word
or a sentence. I need to see case law that says, as

to a

similar pattern of facts, Courts recognize those facts, the intent as expressed by failure to carry through is not willfulness. Because my understanding of how we deal with duties in the community is that that pattern of -- we accept that pattern of fact as willfulness, because it's a known duty, and ultimately he has the responsibility to carry through on that duty, and it is not that he lacks the capacity to carry through, that is the mental capacity, in terms of mental illness or intelligence. It is a level of disorganization or however you want to call it that I don't think is inconsistent with a finding of willfulness.

That says to me, if you want to find cases that say, Judge, these cases drive you to the result, not because of a quote, but because these cases have my defendant in essence in that fact pattern, I am happy to see them. But otherwise, I am prepared to go ahead and make a finding of willfulness, which means, as I understand it, a finding of

guilt for the three years.

Then the question is, what do we do about the mechanism to implement what I am saying.

I can enter a judgment today, subject to papers coming in, or I can defer and -- I think what I will do is, I will enter the judgment, unless somebody tells me I am making some mistake or error as a matter of law, I will enter the judgment on a certain day. Between now and then I will read any papers either party wants to submit to me on the case law. If that case law changes my mind, I will defer entering a judgment and we will get back together and talk about what the significance of it is.

MR. FIORAVANTI: Would you allow a submission, notwithstanding your tentative findings, of proposed findings, based on our view of the case?

THE COURT: Sure. Anything anybody wants to give me between now and that date is fine with me. As long as it Is comment on the evidence and the record that has been developed so far, that is fine.

I was going to pick a date at random and say here is a date that I would be prepared to enter judgment. If somebody says, Judge, that is an inappropriate procedure, we have a reason why you can't or shouldn't do that, let me know.

My thought is two weeks from today, Friday, March 5th. It will just be a paper that says for the reasons set out by the Court following the presentation of evidence, it is hereby ordered as follows ...

Between now and then, if you want to send me some papers and give me some cases to read and findings of fact to read, that is fine with me. My intention of what I did today was to try to -- there aren't many facts in dispute in the context of what happened at 12:00 on Tuesday. It is really a question of what was the purpose and what is the significance of essential facts. I think I have made the judgments that need to be made about the characterization of facts the parties have submitted.

MR. FIORAVANTI: Would you have any difficulty with our ordering transcription of your comments so that we have an understanding of what the fact pattern that you have found is?

THE COURT: No. I will get the court reporters to do that right away. No difficulty. That's why we have open courts. We will get that, and I imagine a Circuit will be reading it some day. Right? Okay.

MR. FIORAVANTI: Thank you, sir.

THE COURT: Court is in recess. I appreciate your presentation.

(Court recessed at 4:45 p.m.)

- - -

Reporter: Kevin Maurer

ARGUMENT OF COUNSEL - FEBRUARY 19, 1999

PAGE : B-186

16 . MR. FIORAVANTI: Every time the government is
17 challenged to identify a single intent item that occurred
18 between 1-1-91 and 10-15-93, it starts to refer to the '85
19 through '89 years and to the events that occurred from 1994
20. forward.
21 That is not enough to convict Frank Marcone in
22. this case, if your Honor please. And all of the evidence
23 that occurred between January of '91 and the fall of 1993 is
24 to the contrary.
25 There is not a single event that Ms. Markman can

PAGE: b-187

1 point to, not one blessed piece of evidence, that falls
2 within the goal posts that substantiates this idea that with
3 respect to those returns in that time frame he had an intent
4. Not to file.

MS. MARKMAN: He didn't file them....

PAGE: 188

10 (Fioravanti)...Well, if we are going to look

downstream, if we
11 are going to look at the after-the-facts events, let's look
12 what he filed, sir. Let's look at what Marcone filed a year
13 and a half before the indictment. A year and a half before
14 he knew what the government's figures were gong to be. He
15 filled two out of three returns claiming income in excess
16 or what the government has ascribed to him for a total tax
17 due and owing, a year and a half before he knew the figures
18 $9,000 in excess of what the government has identified.
19. If we are going to look downstream, if we are
20. going to go outside the goal posts, is that in the nature of
21. an individual who is looking to avoid his responsibilities?
22. of course, it's not.
23. I come back to the proposition, Your Honor, that
24. unless the Court is prepared to find that the events that
25. were ongoing with Marcone reaching out to his accountant

PAGE B-189

making efforts to get the returns filed, pay an estimated tax when the accountant hadn't recommended that he do so, sending the accountant possibly three, but at least one summary, which should have enabled the accountant to file the 1992 return, on an estimated or other basis, throw out the questioned items, toss them out and prepare a return - - but as Mr. Hodlofski said, we were taught, get the return filed. It can be dealt with in an audit later on. There simply is no evidence, no evidence in the prescribed time period that Marcone demonstrated by any evidence that he can be discerned that he had an intent not to file his returns.

MS. MARKMAN: Sure there is. The biggest piece of evidence: He didn't file them. He knew he had an obligation. He knew what the obligation was. It was an he could meet, because he had met it before.

He was apparently a functioning lawyer. He practiced law. He lived his life. ...

In the

SUPREME COURT OF THE UNITED STATES

In RE: FRANK J. MARCONE, ESQUIRE

APPLICATION FOR A STAY OF PROCEEDINGS
IN THE THIRD CIRCUIT COURT OF APPEALS
IN
THIRD CIRCUIT APPEAL NUMBER 99-1842

TO THE HONORABLE, DAVID H. SOUTER, JUSTICE OF THE UNITED STATES SUPREME COURT:

Frank J. Marcone, Esquire, pro se, submits this Application for a Stay of Proceedings in the Third Circuit Court of Appeals in Third Circuit Court of Appeals Number 99-1842, pursuant to Rule 23 of the Rules of the United States Supreme Court and in support of the Application avers the following:

1.Frank J. Marcone, Esquire, the Applicant, is an attorney at law and is also the Appellant in the case in which he seeks a Stay.

2. Frank J. Marcone, Esquire resides at 2530 North Providence Road, Upper Providence, Pennsylvania 19063 and was admitted to the Bar of the Pennsylvania Supreme Court in 1963. He is 63 years of age.

3. This Application is being directed to Supreme Court Justice David H. Souter in his capacity as Circuit

Justice for the Third Circuit Court of Appeals.

4. On October 11, 1989, the Applicant was suspended for a four year period form the Bar of the Pennsylvania Supreme Court upon charges that he had delayed the return of a $2,000 bail refund which had been assigned to him pursuant to a Court approved Assignment.

5. On July 19, 1990, the Pennsylvania Supreme Court vacated the suspension Order and remanded the disciplinary matter to the Pennsylvania Disciplinary Board after considering the Motions filed by the Applicant that he was in fact innocent of any infraction of the Rules of Discipline.

6. On July 6, 1995, the Pennsylvania Supreme Court re-imposed the four year suspension imposed in October II, 1989 and gave credit for the previously served suspension period of nine and one half months.

7. On September 28, 1998, the Applicant was restored to practice in the Eastern District Court of Pennsylvania.

8. On October 8, 1998, the Applicant was Indicted and charged with having late filed three tax returns in 1990, 1991 and 1992.

9. The Bench of the Eastern District Court recused from hearing the Criminal Charges after having recently voted in the restoration of the Applicant's license to practice law.

10. On August 16, 1998, the Third Circuit Court of Appeals issued a Rule to Show Cause why the Applicant should not be suspended for an additional four (4) years as a result of the reciprocal suspension which had been imposed by the Pennsylvania Supreme Court in 1989 and reimposed in 1995. The suspension period had expired on September 28, 1998.

11. On October 6, 1999, the Applicant was sentenced in the criminal charge which had been tried by the Honorable Roderick R. McKelvie, sitting in the Federal Court in Wilmington, Delaware. An appeal of that conviction was timely filed in the Third Circuit Court of Appeals. Your Applicant is represented by Stephen P. Patrizio, Esquire, of Philadelphia but he has been engaged in a trial of a first degree murder case and has been obligated to argue a death penalty issue on December 13, 1999. The Applicant has been obligated to proceed pro se especially since he is most familiar with the intricacies of the criminal charge and the now intertwined suspension and recusal issue.

12. In the Disciplinary Issue which was precipitated by the action taken by the ThirdCircuit Standing Committee on Attorney Discipline, your Applicant has been represented by Robert D. Greenbaum, Esquire also of Philadelphia.

13. Your Applicant has asserted his innocence of the charges which resulted in the suspension imposed in 1989 and by evidence presented at Disciplinary Hearings, convinced the Hearing Committee assigned the re-hearings, that the complainant had lied at the hearings and the Applicant had been truthful. Nonetheless, the Pennsylvania Supreme Court reimposed a suspension without Opinion.

14. Your Applicant has asserted he is innocent of any wrongdoing and should not have been suspended in any court as a result of the Rules of Reciprocal Suspensions.

15. In 1989, the Applicant had requested a hearing to prove he should not be suspended since he had been proven innocent but the Third Circuit, by Judge Morton 1. Greenberg, denied that request and on March 29, 1990, entered an Order that the Third Circuit would not "reexamine finding of the Supreme Court of PA". ( A copy of the docket entries is attached hereto and is Marked Exhibit "A".)

16. On August 12, 1998, Judge Greenberg initiated the present proceedings by issuing a Rule to Show Cause. The Panel of Judges comprising the Standing Committee include Judges Greenberg, Sloviter and Cowen.

17. The Applicant responded to the Rule to Show Cause evidencing among other reasons, that he had served a four year suspension under the Third Circuit Rules of Attorney Discipline which impose an "independent and automatic" reciprocal suspension upon an attorney suspended in any other court. The Applicant asserted Notice of the Suspension had been served upon the Third Circuit Court of Appeals at least on seven different occasions and also that the Applicant had obeyed the provisions of the Rules of the Third Circuit and had not attempted to practice in the Third Circuit for over four years. Nonetheless, the Standing Committee ignored the Rules and issued a Report and Recommendation that the Applicant be suspended for an additional four years or indefinitely, unless he is reinstated to practice before the Pennsylvania Supreme

Court, whichever is later. That suspension is an imposition of a penalty which is not imposed as a result of any infraction of the Third Circuit Rules and is more excessive than the Rules which apply to disbarment.

18. On November 26, 1999, Chief Judge Edward R. Becker, signed an Order which suspended the Applicant from the Bar of the Third Circuit Court of Appeals for four (4) years or until he is reinstated to the Bar of the Pennsylvania Supreme Court, whichever is later. A Copy of that Order is attached hereto and is marked Exhibit "B".

19. During the proceedings prior to the submission of the Report and Recommendation to the Bench of the Third Circuit for their vote, both the Applicant as well as his attorney, Robert D. Greenbaum, Esquire, requested the Chief Judge withhold submitting the Report and Recommendation to the entire Bench, citing a possible recusal issue in the Criminal Case. A copy of Mr. Greenbaum's letter dated October 18, 1999 and is marked Exhibit "C".

20. The Criminal Case which is above captioned, is on an "Expedited" status at the
request of the Applicant. Judge McKelvie, in bench conclusions, found the Applicant had been "negligent" which by all applicable case law requires an acquittal.

21. On December 1, 1999, the Applicant's Attorney, Stephen P. Patrizio, Esquire, received a notice that the Third Circuit Panel assigned to hear the Appeal issues in the above captioned case had decided to deny argument and to take the case on Briefs alone. The Panel which was assigned the case was Judges Carol Los Mansman, Judge Theodore A.

McKee and Judge Morton 1. Greenberg. A copy of that Notice is attached hereto and is marked Exhibit "D".

21. The decision to deny argument was in violation of the Rules of the Third Circuit in that the Rules require the panel of Judges make the decision only after examining all briefs and the record. When the decision was made in this case, the only brief which had been submitted was the Appellants. The Appellee's Brief and the Appellant's Reply Brief were not filed and in fact the Appellant's Reply Brief is being filed today, December 14, 1999.

22. On December 9, 1999, the Applicant filed the attached Appellant's Motion to Recuse and Either Reappoint a Suitable Panel or Refer to Another Circuit. A copy of that Motion and supporting Brief are attached hereto and marked Exhibit "E".

23. The Appeal is due for submission to the panel of Judges on December 16,1999 and without action taken on the Motion to Recuse, the Applicant is forestalled from proceeding for relief in This Court.

24. This is the only Court from whom relief may be obtained since the Third Circuit has not acted upon the Motion and if the Appeal is submitted to the panel as planned, that submission is in violation of the right of the Appellant to request Recusal.

25. The Applicant has satisfied the provisions of Rule 23 of the United States Supreme Court by requesting relief and a stay in the Motion which was filed in the Third Circuit Court of Appeals on December 9, 1999.

26.There is no need for a Bond since this is a criminal matter and the Judgment which is the subject matter of the Appeal does not have monetary value.

27. This Court has authority to grant the Relief sought under the All Writs principal.

28. This Court has authority to transfer this Appeal to another Circuit should that resolution appear necessary.

WHEREFORE, the Applicant respectfully prays the Supreme Court of the United States issue a Stay, directing all further action taken in the Third Circuit Court of Appeals related to the above captioned Appeal cease forthwith until the issue related to the Request for Recusal is decided in the Third Circuit and until an Order of the Third Circuit is issued resolving the issue of recusal which is currently before it for consideration.

Respectfully submitted,

Frank J. Marcone, Esquire pro se.

December 14,1999

CERTIFICATE OF SERVICE

Frank J. Marcone, Esquire, hereby certifies that on the day of filing of this Application for Stay, he directed Service of the said Application to the following by both Mail and by personal service by hand carrier.

P. Douglas Sisk, Clerk
Third Circuit Court of Appeals
Room 21400 United States
Courthouse
601 Market Street
Philadelphia, Pennsylvania
19016

Joan L. Markman, Esquire
Assistant United States
Attorney
615 Chestnut Street
Suite 1250
Philadelphia, Pennsylvania
19106

Frank J. Marcone, Esquire
pro se

December 14,1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. Misc. Record No. 89-8079

In the Matter of

FRANK J. MARCONE,

an Attorney at law

REPORT AND RECOMMENDATION OF THE STANDING COMMITTEE ON ATTORNEY DISCIPLINE

BEFORE: SLOVITER, GREENBERG, and COWEN, Circuit Judges

Pursuant to Rule 10.3 of the Rules of Disciplinary Enforcement of this court, the Standing Committee on Attorney Discipline makes the following Report and Recommendation to the court. The proceedings in this court arise out of the discipline imposed on Frank J. Marcone by the Supreme Court of Pennsylvania for his failure to return $2,000 which constituted a bail fund that came into his possession while Marcone was representing a client in a Pennsylvania state court criminal proceeding. Marcone at the time was a member of the Pennsylvania bar and also was a member of the bar of this court and continues to be a member of the bar of this court in good standing.

The procedural background of this case is set forth in an order to show cause issued on August 12, 1998, by the Standing Committee which required Marcone to show cause

why he should not be suspended from the bar of this court for a period of four years commencing upon the date of the order of suspension of this court and until such time as he is reinstated years, to the practice of law by the Supreme Court of Pennsylvania, whichever is later, and until the further order of this court." In summary, the order to show cause, which is annexed hereto, explains that following a hearing held on May 30, 1990, the Standing Conuiuttee issued a Report and Recommendation on June 8, 1990, recommending that Marcone be suspended from the practice of law as a reciprocal discipline based on a suspension for four years by the Supreme Court of Pennsylvania on October 11, 1989, by reason of his conduct regarding the ball fund incident. As set forth in the August 12, 1998 order to show cause, the Supreme Court of Pennsylvania on July 19, 1990, vacated the suspension order of October 11, 1989, and remanded the matter to its Disciplinary Board for further proceedings. Consequently, this court did not act on the Report and Recommendation of the Standing Committee. Marcone, however, was directed to notify this court when the Pennsylvania proceedings were completed. The orders of October I 1, 1989, and July 19, 1990, are annexed hereto.

Following the entry of the order of the Supreme 'Court of Pennsylvania of July 19, 1990, there were further proceedings including protracted hearings before hearing committee #2.02 of the Disciplinary Board. The hearing committee filed a report on August 8, 1994, that concluded that Marcone had violated various disciplinary rules of the Pennsylvania Code of Professional Responsibility. The hearing committee, after considering the violations,

mitigating circumstances and Marcone's prior disciplinary record indicating his recidivistic conduct, recommended that he be suspended from the practice of law for nine months and 14 days with credit for that period of suspension already served. The Disciplinary Board, however reached a somewhat differenet result, as it concluded in its Report and Recommendation to the Supreme Court of Pennsylvania dated April 4, 1995, that the additional evidence on the remand did not justify modifying the four year period of suspension originally imposed.

On July 6, 1995, the Pennsylvania Supreme Court completed its proceedings following the remand to the Disciplinary Board and again suspended Marcone for four years but gave him credit for nine months, 14 days suspension he already had served. Thus it obviously agreed with the Disciplinary Board rather than the hearing committee.

The order of the Pennsylvania Supreme Court of July 6, 1995 is annexed hereto.

Notwithstanding this court's direction to Marcone to advise this court when the Pennsylvania proceedings were compelted, he did not advise this court of the entry of the July 6, 1995 order of the Supreme Court of Pennsylvania. Nevertheless, that order eventually came to the attention of the Standing Committee which accordingly issued the August 12, 1998 order to show cause. Marcone file (sic) a response to the order on September 1, 1998, and requested a hearing. The Standing Committee then scheduled a hearing on the matter for December 17, 1998. Marcone, however, requested a postponement which was granted.

Ultimately the matter was rescheduled for July 22, 1999, and the Standing Committee held a hearing that day with Marcone present. At that time Marcone filed a supplemental response to the order to show cause. Both his original response and supplemental response are annexed hereto.

At the hearing, Marcone confirmed that he remains under suspension 'in Pennsylvania. The Standing Committee recognized that the period of suspension had expired in Pennsylvania and thus inquired as to why Marcone's suspension had not terminated. He explained that to be readmitted to the Pennsylvania bar he would have to apply for readmission and that he had not done so and had no intention of doing so. He also stated that while he had been admitted pro hoc vice in other states, he is not a member of the bar of any state.

Rule 3.1 of the Rules of Disciplinary Enforcement provides that the "Identical discipline imposed by another court is presumed appropriate for discipline imposed as a result of that other court's suspension or disbarment of an attorney." Rule 10.5 provides that the order of suspension establishes

> that the conduct for which the discipline was imposed in fact occurred and that the discipline imposed was appropriate unless it appears: (a) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (b) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion on that subject; or (c) that the imposition of the same discipline by

> this Court would result in grave injustice; or (d) that the misconduct established is deemed by this Court to warrant substantially different discipline.

In this case it cannot reasonably be argued that the state proceedings were "so lacking in notice or opportunity to be heard as to constitute a deprivation of due process." Quite to the contrary, there were extensive hearings in which Marcone participated both before the Supreme Court imposed the original suspension and then on the remand. Indeed, it is perfectly clear that the Supreme Court of Pennsylvania was completely fair to Marcone as it vacated the original suspension at his request and required further proceedings which delayed the matter for almost five years.

Moreover, the report of the hearing committee and the Report and Recommendation of the Disciplinary Committee establish that there was not an infirmity in the proof establishing the misconduct. In this regard the Standing Committee points out that while Marcone contends that he did not act improperly with respect to the bail fund, our action here is reciprocal and thus we accept the state disciplinary findings unless we have "the clear conviction" that we cannot do so consistently with our duty. We have no such conviction. Thus, this case differs from a situation in which we are acting in an original capacity in a disciplinary proceedings where there have been no state proceedings. See, In re Mitchell, 901 F.2d II 79 (3d Cir. 1990). Finally, we see no injustice in the period of the suspension or other reason to recommend a

substantially different discipline.

The Standing Committee therefore finds as a fact that the Pennsylvania Supreme Court has suspended Marcone for four years for disciplinary infractions arising from his failure to return the bail fund..

Furthermore, the Committee finds that there is no reason to conclude that the state disciplinary procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process. Moreover, there is no reason predicated on the proofs to refuse to accept the Pennsylvania Supreme Court's conclusions suspending Marcone for four years. While it is true that the order of the Pennsylvania Supreme Court of July 6, 1995, does not cite the reason for the suspension, that order reinstates the original suspension order of October 11, 1989, which was predicated on professional misconduct arising from his failure to return the bond fund. Thus, there can be no doubt as to the basis of the Supreme Court of Pennsylvania action. In the circumstances, the Standing Committee recommends that the court suspend Marcone for four years, commencing upon the date of the order of suspension of this court and until such time as he is reinstated to the practice of law by the Supreme Court of Pennsylvania, whichever is later.

In making this recommendation the Standing Committee emphasizes that its recommendation is not merely that the court suspend Marcone four years. Marcone has been a member of the bar of this court derivately to his membership 'in the Pennsylvania bar. See Fed. R. App. P. 46(a); In re Abrams, 521 F.2d 1094, 1101 (3d Cir. 1975). If Marcone

adheres to his plan not to seek readmission to the Pennsylvania bar and is not admitted to any other state, then his suspension from the bar of this court should be continued indefinitely.

Respetfully submitted,
*Dorlores K. Soloviter*
*Morton I.. Greenberg*
*Robert E. Cowen*
Circuit Judge

DATED: September 7, 1999

LAW OFFICES OF
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October 18, 1999

VIA HANT) DELIVERY

Honorable Edward R. Becker
Chief Judge
United States Court of Appeals
for the Third Circuit
United States Courthouse
601 Market Street, Room 19613

Philadelphia, PA 19106

RE: In re: Frank J. Marcone Mic. No. 89-8079

Dear Judge Becker.

I represent Mr. Marcone in connection with the Report and Recommendation issued by the Standing Committee on Attorney Discipline on September 7, 1999.

1 am writing to Your Honor for two reasons, First, Mr. Marcone has asked me to give the Court notice of the sentencing in IRS v. Marcone, E.D.Pa. 98-cr-544. Judge McKelvie imposed a sentence of four (4) months imprisonment, four (4) months house arrest and one (1) year supervised release after completion of the house arrest. There was no fine imposed nor was restitution required.

Post trial motions were denied and a request for expedited appeal to this Court is being filed by Mr. Marcone or his counsel.

Second, I am preparing to file Exceptions to the Report and Recommendation of the Standing Committee on Attorney Discipline. Currently, the Exceptions are due October 27, 1999, and we anticipate meeting that filing deadline. However, in light of the pending appeal in the IRS matter we respectfully request that the Court hold the disciplinary matter in abeyance and not consider the Report and Recommendation and Exceptions until resolution of the appeal, so that the members of the Court will not be considering the appeal at the same time as the disciplinary matter, which might otherwise require recusal. In addition. we respectfully request that the members of the Standing Committee not be assigned to hear die appeal in the tax matter.

Respectfully,

*Robert D, Greenbaum,*

RDG/ns
cc: Honorable P. Douglas Sisk
Frank J. Marcone, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: :MISCELLANEOUS
FRANK J. MARCONE : NO. 95-71
:

FILED MAY 12, 1998

MICHAEL E. KUNZ,
CLERK

ORDER

AND NOW, this llth day of May, 1998, it appearing that by Orders of November 30, 1989, August 16, 1990, and February 15, 1996, this Court suspended respondent from the practice of law for the period of four years that the Supreme Court of Pennsylvania imposed by its orders of October 11, 1989, July 19, 1990, March 6, 1995 and July 6, 1995; and

it further appearing that this Court's February 15, 1996 order provided that respondent 'is suspended from practice before this Court until his current four year suspension by the Supreme Court of Pennsylvania expires'; and

it further appearing that the Court of Appeals affirmed this Court's Order of February 15, 1996 by judgment order of July 3, 1996; and

it further appearing that the four year period of suspension, including credit for time previously suspended, will expire on September 28, 1998; and

it further appearing that a Committee consisting of the Honorable Harvey Bartle, III, the Honorable Stewart Dalzell and the Honorable Anita B. Brody conducted a hearing on respondent's application for reinstatement on April 23, 1998; and

it further appearing that the Committee found that, pursuant to Local R. Civ. P. 83.6, Rule VII, respondent's resumption of the practice of law will not be detrimental to the integrity and standing of the bar or to the administration of justice, or subversive of the public interest; and

it further appearing that the Committee recommended to the judges of this Court on May 4, 1998 that respondent's application for reinstatement be granted, and that respondent be reinstated at the earlier of September 28, 1998 or his actual reinstatement date to the bar of the Supreme Court of Pennsylvania,

It is hereby

ORDERED that respondent's application for reinstatement is GRANTED, and that respondent shall be reinstated as a member of the bar of this Court at the earlier of September 28, 1998 or his reinstatement to the bar of the Supreme Court of Pennsylvania.

FOR THE COURT:

Edward N. Cahn
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In the Matter of
Frank J. Marcone,

C.A. Misc. Record No. 89- 8079 an attorney at law

EXCEPTIONS TO THE REPORT AND RECOMMENDATION OF THE STANDING COMMITTEE ON ATTORNEY DISCIPLINE

Pursuant to Rule 10.3 of the Rules of Disciplinary Enforcement, Frank J. Marcone, by and through his undersigned counsel, hereby files the following exceptions to the Report and Recommendation of the Standing Committee on Attorney Discipline dated September 7, 1999.

1. Introduction

This matter arises out of events that occurred in 1986 and which are,. highly contested.

Frank J. Marcone is a lawyer who was initially admitted to the Pennsylvania bar in 1963. He had a diverse practice before the state and federal courts. As is set out in greater detail below, Mr. Marcone denies the substance of the allegations that led to his suspension by the Pennsylvania courts and which is the foundation for the reciprocal suspension proposed by the Report and Recommendation. However, the Standing Committee would

appear to base its recommendation on the failure of Mr. Marcone personally to give notice of the 1995 Pennsylvania suspension to this Court and the conclusion that the facts do not meet the requirements of Rule of Disciplinary Enforcement 10.5, which permits deviation from the sanction imposed by a sister jurisdiction. As is demonstrated herein, it is respectfully submitted that this Court's obligation to promote justice requires the conclusion that no further sanction should be imposed on Mr. Marcone, and that he be reinstated to the bar of this Court. Mr. Marcone has a deep and continuing desire to return to the practice of law.

II. History

Although there is a long and tortuous history to this case, it is only set out briefly here to provide some background and context for the recent events occurring before this Court.[1] Over the years Mr. Marcone has represented a wide range of clients, including criminal defendants. As part of his representation of one James Travis, he was authorized to process a bail refund. The $2,500 bail had been posted by Travis' stepfather, John J. Giblin. In 1986 Mr. Marcone obtained a bail refund of

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[1] Attached hereto as Exhibit A are the Report and Recommendation of Judges Bartle and Brody dated January 22, 1996, the dissenting Report and Recommendation of Judge Dalzell dated January 22, 1996 and the December 3, 1997 Report and Recommendation of Judges Bartle and Brody and the dissent of Judge Dalzell. These reports and recommendations and dissents detail the findings of the District Court's Standing Committee.

$2,000. This money was deposited into Mr. Marcone's operating account rather than an escrow account. It was alleged this was improper and that the funds should have been deposited into an escrow account for client funds. Of significance, Mr. Marcone turned the $2,000 over to Mr. Giblin.

In February 1988, the Office of Disciplinary Counsel filed a Petition for Discipline against Mr. Marcone. The principal claim was that Mr. Marcone improperly withheld this $2,000 bail refund.[2] In June and July 1988, hearings were held by Pennsylvania Hearing Committee #2.01, and on February 13, 1989, the Hearing Committee submitted its Report recommending a five year suspension. The Disciplinary Board submitted its Report and Recommendation recommending the same suspension. On October II, 1989, the Pennsylvania Supreme Court suspended Mr. Marcone for a period of four years. Mr. Marcone, on October 25,1989 filed a Petition for Reconsideration and Reargument with the Pennsylvania Supreme Court, and submitted in support of the Petition, affidavits attesting to the fact that his mental condition was so impaired at the hearings before Hearing Committee #2.01 that he was unable to accurately recall the events out of which the disciplinary proceedings arose.[3] He also

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' The $2000 bail refund was found by a Pennsylvania fact finder, Hearing Committee #2.02, to have been partial payment of Mr. Marcone's fee for services rendered. 1/22/96 Bartle and Brody R & R at 4

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At the initial hearings before Hearing Committee #2.01, Mr. Marcone testified that he could not recall the facts surrounding his receipt of the bail reftmd, had suffered from a

asserted that newly discovered evidence warranted a new hearing. On July 19, 1990 the Petition was granted and the Pennsylvania Supreme Court vacated the suspension and remanded to the Disciplinary Board for ftuther hearings.

The matter was assigned to a new Hearing Committee, #2.02. After a series of hearings held over a period of six (6) months, Hearing Committee #2.02, on August 8, 1994, issued its report concluding that the bail money which served as the primary basis for the suspension was in fact part of Mr. Marcone's fee. Hearing Committee #2.02 also found that Mr. Marcone suffered a mental breakdown in or about April 1986 and that as of June 1988 he was unable to represent himself competently before Hearing Committee #2.01. 1/22/96 Bartle and Brody R & R at 4. Hearing Committee #2.02 also found at Finding 45 that Mr. Marcone was not competent to testify before Hearing Committee #2.01. 1/22/96 Dalzell R & R at 3. The conclusion of Hearing Committee #2.02 was that Mr. Marcone be suspended for the period equal to the period already served - nine months, fourteen days, being the time between the entry of the original suspension by the Pennsylvania Supreme Court on October 11, 1989 and the date that suspension was vacated on July 19, 1990. The Disciplinary Board disagreed with this recommendation and held that Mr. Marcone had not produced newly discovered evidence

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"breakdown," had voluntarily withdrawn from practicing law for months and had turned over the $2,000 reftmd to Mr. Giblin simply because Mr. Marcone had no evidence to contradict Giblin. Mr. Giblin subsequently bragged to others that he had intentionally caused the suspension of Mr. Marcone.

and recommended that the case be determined on the basis of the report of Hearing Committee #2.0 I.[4]

By order dated July 6, 1995, Mr. Marcone was suspended by the Pennsylvania Supreme Court for a period of four years, but with credit for nine months, fourteen days of the suspension already served. Thus, the suspension period expired on September 28, 1998.[5]

By order of the United States District Court for the Eastern District of Pennsylvania dated October 10, 1995, the matter was referred to a disciplinary committee of the District Court for determination of whether any reciprocal suspension from that court should be imposed. The report and recommendation of that three member committee recommended, on a divided vote, the imposition of a four year suspension. That report and recommendation, from which Judge Dalzell dissented and issued his own report and

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' The Disciplinary Board would appear to have discounted or ignored the factual findings of Hearing Committee #2.02 that Mr. Marcone was not competent to testify or to represent himself during the proceedings before Hearing Committee #2.01. Those findings of Hearing Committee #2.20 alone would nullify completely the findings of Hearing Committee #2.01 and nullify its recommendation. This determination could support a finding by this Court that the procedures of or sanction imposed by the Pennsylvania court violate the requirements of Rule 10.5 of the Rules of Disciplinary Enforcement. As in the words of Judge Dalzell "my sense of justice will not allow the earlier preceding to obliterate the later..... 1/22/96 Dalzell R& R at 7.

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' Although the time period of the suspension has expired, Mr. Marcone is not readmitted to the Pennsylvania bar. He has hired separate counsel to negotiate the terms of his reinstatement to that bar. One of the reasons he has not be readmitted is the apparent requirement that he admit that he converted the bail refund. Since Mr. Marcone does not believe that to be the case, and Hearing Committee #2.02 found that the bail refund belonged to Mr. Marcone, this requirement presents quite an obstacle, that has nothing to do with appropriateness of his practice of the law.

recommendation,[6] was predicated on the local rules of the District Court which provide for the imposition of the *identical* discipline as that imposed by Pennsylvania. On February 15, 1996, the District Court issued an order suspending Frank J. Marcone from practice before that court "until his current four year suspension by the Supreme Court of Pennsylvania expires." Bartle and Brody R & R at 2, Adams Aff. at @ T3, 5, the Affidavit of Arlin M. Adams is attached hereto and incorporated herein as Exhibit B.

Mr. Marcone appealed that ruling to the United States Court of Appeals for the Third Circuit on February 23, 1996. The District Court requested that Judge Adaxns represent it in that appeal, and he agreed to do so. Adams Aff. at T4. During oral argument before the panel of the Third Circuit on September 24, 1996, reference was made by counsel for Mr. Marcone and by Judge Adams to the fact that the suspension from the practice before the District Court was based on the Pennsylvania suspension. Adams Aff. at T4. The February 15, 1996 order from which the appeal had been taken stated precisely that Mr. Marcone "is suspended from practice before this Court [the District Court] until his current four year suspension by the Supreme Court of Pennsylvania expires." Adams Aff. at T5. The

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6 Judge Dalzell dissented from the Bartle and Brody report and recommendation because of "the abiding unease I feel upon reading and re-reading the record," and concluded that the substantial record, together with the disquieting procedural history leads me to conclude that Mr. Marcone's unquestioned 1986 misconduct warrants 'substantially different discipline' from what the Pennsylvania Supreme Court finally imposed on July 6, 1995." 1/22/96 Dalzell R & R at 1.

February 1996 Order is an unequivocal statement that the District Court's suspension was reciprocal. This Court affirmed the District Court's imposition of the four year reciprocal sanction by order dated August 7, 1996.

By order dated May 12, 1998, the District Court granted the application for reinstatement and held that Mr. Marcone "shall be reinstated as a member of the bar of this Court at the earlier of September 28, 1998 (the expiration of the period of suspension) or his actual reinstatement date to the bar of the Supreme Court of Pennsylvania."

On August 12, 1998, the Third Circuit Court of Appeals issued an Order to Show Cause why Mr. Marcone should not be suspended from the bar of this Court for a period of four years commencing with the issuance of an order of suspension. This Court's Standing Committee on Attorney Discipline issued a Report and Recommendation on September 7, 1999.

II. Argument

A. Notice to the Third Circ@

Mr. Marcone has admitted throughout the proceedings before the Standing Committee that he did not personally give this Court notice of the Pennsylvania suspension. He regrets that omission. Marcone Aff. at 110; the Affidavit of Frank J. Marcone is attached hereto and incorporated herein as Exhibit C. With the passage of time, Mr. Marcone failed to recall the 1990 letter from the Clerk of this Court requesting notification upon the completion of the matter by the Pennsylvania Supreme Court. Marcone Aff. at T7. It was never Mr. Marcone's intention to withhold information from this Court or to deceive the Court.

Marcone Aff. at T9. However, his oversight concerning personally giving this Court notice, although significant, should not serve as the basis for ultimately more than doubling the very sanction which serves as the foundation for the recommendation of the Standing Committee.

Mr. Marcone was aware that in 1989, the Pennsylvania Supreme Court directly notified this Court of the initial suspension. He believed that the Pennsylvania Supreme Court's policy was to notify both state and federal courts of any disciplinary action imposed by it. Marcone Aff. at T4, 6. This belief is confirmed by the affidavit of Charles W. Johns, Prothonotary,

Pennsylvania Supreme Court:

> among the responsibilities of the Prothonotary's office is the dissemination of copies of disciplinary actions taken by the Pennsylvania Supreme Court. Such dissemination is made for the purpose of notice. The notices are sent to the United States District Court for the Eastern District of Pennsylvania, *the United States Court of Appeals for the Third Circuit,* the National Discipline Data Bank maintained by the American Bar Association, as well as a variety of courts and other interested entities within the Commonwealth of Pennsylvania. It was in 1995, and continues to be, our practice to send such notices pursuant to our general operating rules and procedures. The docket in the matter of Frank J. Marcone, No. 690 Disciplinary Docket No. 2, Disciplinary Board No. 16 DB 88 reflects that notices of the suspension imposed on July 6, 1995 were duly sent.

Johns Aff. TT 3-6, emphasis added; the Affidavit of Charles W. Johns is attached hereto and incorporated herein as

Exhibit D.

The National Lawyer Regulatory Data Bank (the "Data Bank") has confirmed that (i) it received notification from Pennsylvania of the July 1995 suspension ("Notice"), (ii) the Notice the Data Bank received listed the United States Court of Appeals for the Third Circuit as one of the several jurisdictions before which Mr. Marcone was admitted to practice, (iii) the usual practice of the Data Bank is to send a Reciprocal Report to all of the jurisdictions listed in the Notice explaining that the discipline had been imposed by Pennsylvania, and (iv) there is no reason to believe that the Data Bank's usual policy was not followed in Mr. Marcone's case.[7] A copy of the report of the Data Bank relating to the July 6, 1995 suspension by Pennsylvania is attached hereto and incorporated herein as Exhibit E.

In fact, by 1996 the Third Circuit had multiple instances of actual notice from a variety of sources:

* the District Court's order of suspension, which was appealed to this Court, specifically referred to the Pennsylvania suspension;

* the hearings held by this Court in the 1996 appeal of the United States District Court for

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[7] On October 26, 1999, the undersigned counsel had several telephone conversations with Ms. Nancy Gronlund, Manager of the ABA National Lawyer Regulatory Data Bank. The substance of the conversation is recounted above.

the Eastern District of Pennsylvania's four year suspension;

* the oral argument before this Court presented by Mr. Marcone's counsel and Judge Adams *(see,* Adams Aff. at TT4, 6);

* ·notice mailed to the Third Circuit by the Prothonotary of the Pennsylvania Supreme Court *(See,* Johns Aff. at TT4-6):[8]

* ·notice from the ABA National Lawyer Regulatory Data Bank; and

* ·notice published by the Pennsylvania Disciplinary Board pursuant to PA Rule of Disciplinary Enforcement 217(f).[9]

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8 The docket in this matter does not reflect the receipt of the notices sent by the Prothonotary of the Pennsylvania Supreme Court and the ABA National Lawyer Regulatory Data Bank.

9 ' ' Rule 217(f) provides: "the Board shall cause a notice of the suspension, disbarment or transfer to inactive status to be published in the legal journal and a newspaper of general circulation in the county in which the formerly admitted attorney practiced." Additionally, disciplinary action taken by the Pennsylvania Supreme Court is published in *The Pennsylvania Lawyer,* which is published six (6) times per year, and notice of Mr. Marcone's suspension was published in *The Pennsylvania Lawyer,* November/December 1995, page 4, a true and correct copy of which is attached hereto and incorporated herein as Exhibit F.

The failure of the Report and Recommendation to note all of these forms of notice is significant.[10] Even if this Court did not receive the actual notice sent by the Prothonotary of the Pennsylvania Supreme Court and the ABA National Lawyer Regulatory Data Bank, and was not aware of the published notice, the Eastern District's order and the oral argument before this Court constitute notice to the Court of the underlying suspension of Mr. Marcone's privilege to practice before the bar of Pennsylvania. The Report and Recommendation of Judges Bartle and Brody based its recommendation that the District Court should impose a reciprocal sanction on the fact that the Pennsylvania Supreme Court imposed the sanction. The dissenting Report and Recommendation of Judge Dalzell recommended that District Court "not march in lockstep with" the Pennsylvania courts but that it exercise its own

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10 There is another form of notice that is ordinarily given. Rule 83.6.XI.C of the Local Rules of the Eastern District of Pennsylvania, provides:

> Whenever it appears that any person convicted of any crime or disbarred or suspended or censured or disbarred on consent by this court is admitted to practice law in any other jurisdiction or before any other court, the Clerk of this court shall, within ten days of the conviction, disbarment, suspension, censure, or disbarment on consent, transmit to the disciplinary authority in such other jurisdiction or for such other court, a certificate of the conviction or a certified exemplified copy of the judgment or order of discipline, suspension, censure or disbarment on consent, as well as the last known office and residence address of the defendant or respondent.

Interestingly, neither the docket of the District Court nor that of this Court reflects that the notice required by Local Rule 83.6.XI.C was provided to this Court.

sense of justice. 1/22/96 Dalzell R & R at 6. The record before the Third Circuit in 1996 clearly reflected that Mr. Marcone had been suspended by the Pennsylvania Supreme Court.

In the words of Judge Adams, "it is unlikely that the Third Circuit panel would have been unaware of the reciprocal nature of the suspension given the language of the February 15, 1996 order and the references by counsel to the underlying Pennsylvania suspension." Adains Affidavit at @6.

B. Lack of Identity of Sanction

The Standing Committee did not hold hearings *de novo* concerning the underlying facts of the Pennsylvania sanction, but rather concluded that its "action here is reciprocal and thus we accept the state disciplinary findings unless we have 'the clear conviction' that we cannot do so consistently with our duty. We have no such conviction. Thus, this case differs from a situation in which we are acting in an original capacity in a disciplinary proceedings (sic) where there have been no state proceedings." R & R at 5.

Consistent with the conclusion that the basis for the imposition of sanction by this Court is based on reciprocity is the fact that the Order to Show Cause and the Report and Recommendation are based on Rule 3.1 of the Rules of Disciplinary Enforcement which provides that the "identical discipline imposed by another court is presumed appropriate for discipline imposed as a result of that other court's suspension or disbarment of an attorney."

The Report and Recommendation recommends "that

the court suspend Marcone for four *years, commencing upon the date of the order of suspension of this court and until such time as he is reinstated to the practice of law by the Supreme Court of Pennsylvania, whichever is later.*" R & R at 6, emphasis added. The Report and Recommendation concludes by recommending that until Mr. Marcone is readmitted to the Pennsylvania bar, or some other state's bar, that the suspension from the bar of this Court continue indefinitely. The recommended suspension is exceptionally punitive in nature and inconsistent with the principles underlying reciprocity -- the identity of the penalty.

Given the fact that the recommendation of the imposition of the suspension is based on Rules 3.1 and 10.5 of the Rules of Disciplinary Enforcement, and is therefore derivative in nature, the appropriate suspension, if any, would be for a period of four year *coinciding with the suspension by the Supreme Court of Pennsylvania.* Any such suspension would have expired on September 28, 1998. As Professor Rosner states:

> Although the length of the recommended suspension is four years, the same number of years imposed by Pennsylvania, the timing of the sanction of this Court makes it dramatically more severe. As I understand them, the intent of the provisions for reciprocal sanction set forth in Rule 3.1 of the Rules of Disciplinary Enforcement, Third Circuit Court of Appeals, is to impose the same sanction during the same time frame so that a lawyer's practice before all courts is equally restricted. Additionally, the purpose

> of the identity of the reciprocal sanction is to assure that the judicial system as a whole is uniform in regulating the conduct of lawyers.

Seth Rosner Affirmation at TT6-7; the Rosner Affirmation is attached hereto and incorporated herein as Exhibit G.

The premise behind the imposition of an identical reciprocal sanction is comity. Moreover, the uniformity in regulating the practice of lawyers for the same conduct "is reasonable and logical, particularly since courts ordinarily do not undertake independent investigations and fact finding in the context of a reciprocal sanction. In relying upon the process of the sister jurisdiction, the court assumes that the original sanction imposed is appropriate given the circumstances of the particular case." Rosner Affirmation at T8.

Perhaps as justification for commencing the suspension with the issuance of an order by this Court, the Report and Recommendation relies, by implication, on the supposed delay in notice. Similarly the Order to Show Cause dated August 12, 1998 states that since Mr. Marcone did not give notice of the Pennsylvania suspension to the Court..... until the appeal to this court in In re: Frank J. Marcone, No. 98-1079, from an order of the United States District Court for the Eastern District of Pennsylvania refusing to reinstate him to the practice of law, this court was not aware of the July 6, 1995 order of the Supreme Court of Pennsylvania." Of course, this very same type of notice to the Court was given in 1996 in the course of the appeal (In re: Frank J.

Marcone, No. 96-1167) taken from the February 1996 order

of the District Court imposing the sanction running concurrently with the Pennsylvania sanction. The February 1996 order made explicit reference to the Pennsylvania suspension and both counsel for Mr. Marcone and for the District Court made repeated reference to the fact that the District Court's sanction was reciprocal in nature. Notice was also mailed to the Court by the Prothonotary of the Pennsylvania Supreme Court and was published in accordance with Pennsylvania Rule of Disciplinary Enforcement 217(f). *See,* Johns Affidavit 11 4-6 and *The Pennsylvania Lawyer.*

Central to the concept of a reciprocal sanction is the principal that the penalty will be *identical* to the one imposed by the sister jurisdiction. Rule 3.1 of the Rules of Disciplinary Enforcement explicitly states that "the *identical* discipline imposed by another court is presumed appropriate for discipline imposed as a result of that other court's suspension or disbarment of an attorney." Emphasis added. Black's Law Dictionary, 6' Edition, 1990, p. 745, defines "identical" as "exactly the same for all practical purposes." A true and correct copy of page 745 of Black's is attached hereto and incorporated herein as Exhibit H. Clearly, the imposition of a four year suspension which does not run concurrently with the Pennsylvania sanction and which would continue indefinitely is not "exactly the same for all practical purposes" as the Pennsylvania sanction. In fact, as a practical matter the imposition of the recommended suspension would result, at a minimum, in doubling the

Pennsylvania sanction.[11] Thus, as Professor Rosner notes:

> the recommendation of the Committee appears to me to run counter to the intent and purpose of the rule of reciprocity. It has the practical effect of doubling the Pennsylvania sanction from four years to eight years. This is an incongruous result for a sanction based on the provisions permitting reciprocity. I am unaware of instances of similar incongruity in the imposition of reciprocal sanctions where the second (reciprocal) sanction begins after the termination of the initial suspension and terminates years later.

Rosner Affirmation at TT9-1 0.

It is worth noting that on May II, 1998, the District Court determined to reinstate Mr. Marcone to the bar of that Court, a copy of the order is attached hereto and incorporated herein as Exhibit 1. The order of reinstatement held that "the Committee found that pursuant to Local R. Civ. P. 83.6, Rule. VII, respondent's resumption of the practice of law will not be detrimental to the integrity and standing of the bar or to the administration ofjustice, or subversive of the public interest." May 11, 1998 Order at 1-

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" It is likely that Mr. Marcone would be required to notify any other court before which he practices of the imposition of a sanction by this Court. At a minimum, that would include the Eastern District of Pennsylvania to which he gained reinstatement on September 28, 1998. Under the rules of the District Court, he would be subject to proceedings to determine if he should again be suspended from that court. This could result in the anomaly of Mr. Marcone being suspended by the District Court for eight years for the same event which allegedly occurred in 1986.

2. Just as this Court is giving deference to the Pennsylvania sanction in considering imposing a sanction for events that occurred over thirteen years ago, it should recognize and give credence and deference to the findings of the District Court made much more recently, May 1998.[12]

C. Readmission Should Not Depend Upon State Court Admission

The Report and Recommendation recommends that the suspension be imposed until Mr. Marcone is readmitted to Pennsylvania or admitted to the bar of some other state, noting that Mr. Marcone's original admission to the Court was derivative of his membership in the Pennsylvania bar. R & R at 6, citing, Fed. R. App. P. 46(a) and *In re Abrams,* 521 F. 2d 1094, 1101.[13]No case law is cited for the

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12 The need to carefully weigh the reinstatement by the District Court is heightened by the fact that the recommendation of suspension by that court was by a 2-1 split and that the factual and procedural underpinnings of the Pennsylvania sanction are questionable.

13 An exceedingly troublesome anomaly could result if this Court were to impose the four suspension which could only terminate upon readmission to Pennsylvania or the admission to some other state bar. Needless to say, Mr. Marcone would be required to report the imposition of a sanction by this Court. It is unlikely that any bar would permit Mr. Marcone to gain admission to practice while suspended by this Court. Yet his suspension by this Court would not end until he accomplished this impossible task.

proposition that readmission to the bar of this Court is derivative of Mr. Marcone's ability to practice in a state court system. In fact, such a requirement would be contrary to the law and the spirit of the rules governing federal bar practice. In this vein, Professor Rosner notes in his affirmation:

> Although it is common for lawyers to be admitted to federal practice based on their admission to a state bar, loss of the privilege of practice before that bar does not automatically lead to the loss of the privilege of practicing in the federal system. In fact, the very disciplinary rule that permits reciprocal sanction makes it clear that the federal court controls the grant of the privilege to practice before it. This independence highlights the fact that once a lawyer is admitted to practice before the federal court, the privilege is no longer derivative of the state bar admission. The rules contemplate circumstances where the federal court may want to impose no sanction, a less restrictive penalty, or a more severe discipline. However, this divergence only functions appropriately if there is independence from the state bar admission and disciplinary process. The recommendation is contrary to this very independence. It is my understanding that once the term of a suspension has expired, federal courts, on motion of the lawyer, normally grant readmission to the federal bar, without examining whether the lawyer has applied for or been granted readmission to the state bar that originally imposed the suspension. Again, this process is based on the independence of the federal court to regulate the lawyers practicing before it.

> Requiring that Mr. Marcone be readmitted to the bar of Pennsylvania or any other state, as a precondition to his readmission, departs from what I understand to be the normal procedure for readmission to a federal court.

Rosner Affirmation at TT 1 3 -15.

The disciplinary enforcement rule governing reinstatement is very enlightening on this issue. Although the imposition of reciprocal sanction is explicitly provided for in Rule 2, the rules do not require readmission to the sister jurisdiction as part of the process for reinstatement to the federal bar. To the contrary, Rule 12.1 of Attorney Disciplinary Enforcement provides an attorney suspended for six (6) months or less is *automatically reinstated* at the end of the period of suspension upon the filing of an affidavit of compliance with the provision of the order." Emphasis added. No requirement of readmission to the sister jurisdiction is mandated. Rule 12.1 further provides "an attorney suspended for more than six (6) months or disbarred may not resume practice until reinstated by order of the Court." Although reinstatement is not automatic, no mention of being readmitted to practice before the state bar is made in Rule 12. 1. Nowhere in Rule 12 is readmission to the other jurisdiction a requirement to reinstatement to the bar of this Court.

Although the Court has the flexibility to direct the "terms and conditions" upon which reinstatement will be permitted, it is *only* in the case of disbarment or suspension of "five (5) years or more (that) this may include certification by the bar examiners of a state or other jurisdiction of the attorneys

successful completion of an examination for admission to practice." Rule of Disciplinary Enforcement 12.5.

*Abrams, supra,* cited in the Report and Recommendation for the derivative nature of initial admission to practice before the bar of this Court, does not address *readmission* to the federal court, but rather disbarment. Although it is a case that arises from the imposition of a sanction based on a state court sanction, it is not illustrative of what may be required to gain readmission to the bar of the federal court. Continued underlying state bar admission is not a prerequisite to *maintenance* of federal bar admission.

The Second Circuit has addressed the issue of whether a lawyer must be admitted to a state bar in order to continue practicing before a federal court. Although not addressing a reinstatement case, the Second Circuited held: "if, as the literal language of the district court's order suggests, Gouiran's disbarment was based on the fact that he no longer is a member of a state bar, the district court erred. Although an attorney must be admitted to a state bar in order to be admitted to the Southern District bar, *see* Local Rule 2(a), the subsequent revocation of the state bar membership does not automatically disqualify an attorney from the continued practice of law in the district court." *In re Gouiran,* 58 F.3d 54, 57 (2nd Cir. 1995). The *Gouiran* court noted that more than 80 years ago the "Supreme Court characterized the requirement of state bar membership as 'ephemeral in its operation, since its effect is exhausted upon admission' to the federal bar." *Gouiran,* 58 F.3d at 57, *citing, Selling v. Radford,* 243 U.S. 46, 49, 37 S.Ct. 377, 378, 61

L.Ed. 585 (1917). If loss of the state bar membership does not automatically result in loss of federal bar membership, it should be an implied requirement for reinstatement to the federal system. Requiring admission to a state bar in order for Mr. Marcone to be readmitted to the bar of this Court would be tantamount to this Court ceding its regulatory duties to the state.

D. Automatic Suspension

Rule 7.1 of the Rules of Disciplinary Enforcement provides "when a member of the bar of this Court is suspended or disbarred by another court ... the suspension for the same period as imposed in the other court ... *is immediately and automatically* effective in this Court and the Chairperson of the Standing Committee enters an order imposing the aforesaid discipline, but
failure to enter an order does not affect the effective date of the suspension or disbarment." Emphasis added. Thus, Mr. Marcone has been subject to suspension already and the suspension expired on September 28, 1998. Mr. Marcone acted as if he were subject to the automatic suspension imposed by Rule 7.1 and did not practice before the bar of this Court between July, 1995 and the end of his suspension period, September 28, 1998.

E. Grave Injustice

Mr. Marcone is now almost 64 years old and has been explicitly suspended from practice by the Pennsylvania Supreme Court (two periods of time separated by a five year hiatus) and the United States District Court for the Eastern District of Pennsylvania, and implicitly (or based on the rules of the Court, automatically) by this Court, for four

years. He was readmitted to practice before the District Court in September 1998. The imposition of a four year sanction by this Court would likely start a barrage of new proceedings relating to his admission to practice before other courts. That process would impose significant and perhaps devastating financial and emotional hardship on Mr. Marcone and his family. Moreover, the reciprocal nature of the suspension being considered by the Court would be completely lost.

It is respectfully submitted that this Court should also consider that the underlying alleged offense that gave rise to the Pennsylvania sanction, and is now being used as the basis for reciprocal sanction by this Court, occurred 13 years ago, when Mr. Marcone was operating under a mental disability. It should also be noted that Hearing Committee #2.02 Pennsylvania Disciplinary Board recommended in 1994 that the sanction imposed on Mr. Marcone be limited to the suspension already served (nine months, fourteen days). Thus, in the words of the Supreme Court "we do not think that 'the principles of right and justice' require a federal court to enforce disbarment of a man eighteen years after he had uttered a forgery when concededly he &was suffering under an exceedingly abnormal mental condition, some degree of insanity.'" *Theard v. US,* 354 U.S. 278, 282, 77 S.Ct. 1274, 1277 (1957), citation omitted.

This Court, in determining whether to impose a reciprocal sanction, has kept in mind "right and justice." In *Office of Disciplinary Counsel v. Pileggi,* 570 F.2d 480 (3d Cir. 1978), the Court refused to impose a reciprocal one year suspension. Mr. Pileggi had pleaded *nolo contenders* to the

misdemeanor charge of accessory after the fact. He was convicted and sentenced to pay a fine of $5,000. Noting that *except for the misdemeanor conviction, Pileggi* had a good reputation for character and behavior, the Court, after "special note" that Pileggi had not practiced law before the Court since the issuance of the order to show cause, adopted the special master's recommendation that no sanction be imposed. *Pileggi,* 570 F.2d at 482. Clearly, a conviction based on a *nolo contenders* plea is a very serious matter, yet this Court evaluated the circumstances and refrained from imposing the reciprocal sanction. In the instant case, which involves a much less serious, and disputed, offense, the Court should likewise take note that Mr. Marcone did not practice before this Court during the period of his suspension.

In 1996 this Court was provided with notice from the Pennsylvania Supreme Court, the Report and Recommendation of the District Court's standing committee, the District Court in the form of its order imposing sanction which was appealed, and the oral argument of counsel for the District Court and for Mr. Marcone. Although it is admitted that Mr. Marcone failed to personally provide notice to the Court, certainly the six (6) other methods of notification were adequate. In addition, Rule 7.1 of Attorney Disciplinary Enforcement states that Mr. Marcone's suspension commenced in 1995. Mr. Marcone did not practice before the bar of this Court at any time during his suspension.

Because we believe that the facts, circumstances, law, rules and equity require that this Court conclude that it

should not impose a new sanction, even if couched in the terms of being reciprocal, we are not rearguing the merits of the suspensions imposed by Pennsylvania, the District Court or the automatic suspension by this Court, but preserve for future proceedings and incorporate into the record before this Court, the evidence and arguments presented to the various boards, committees and courts. For the same reasons, we preserve the right to argue, in any necessary future proceedings, that Mr. Marcone was denied procedural due process and that should the Court impose the recommended suspension, it would subject Mr. Marcone to double jeopardy. The Supreme Court has held that disciplinary proceedings are of a "quasi-criminal nature." *In re Ruffalo,* 390 U.S. 544, 551, 88 S.Ct. 1222, 1226 (1968).

111. CONCLUSION

For the reasons set forth above, it is respectfully requested that the Court overrule the Report and Recommendation of the Standing Committee, and that the Court issue an order to the effect that Mr. Marcone is reinstated to practice before the bar of this Court.

Respectfully submitted,

Robert D. Greenbaum (Atty. I.D. 44336)
Robert D. Greenbaum & Associates LLC
One Liberty Place, Suite 4900
1650 Market Street
Philadelphia, PA 19103
(215) 419 - 6555
(215)419 - 6550

Dated: October 26, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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C.A. Misc. Record No. 89-8079

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In the Matter of
FRANK J. MARCONE
an Attorney at law

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ORDER

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Present: Becker, Chief Judge; Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee, and Barry, Circuit Judges

This Order is issued Pursuant to Rule 10.3 of the Rules of Disciplinary Enforcement of this Court On September 7, 1999, the Standing Committee on Attorney Discipline referred a Report and Recommendation to the Court. Notice was properly made on the attorney, Frank J. Marcone, Esq., and Counsel. A reconsideration motion was considered by the Committee, and was denied by Order entered September 27, 1999. Exceptions to the Report and Recommendation were filed October 27, 1999, and referred to the Court.

On consideration of the Report and Recommendation, submissions of Frank- J. Marcone, Esq., and the record referred by the Committee,

IT IS ORDERED that the Report and Recommendation of the Standing Committee on Attorney Discipline is approved and adopted. Chief Judge Becker notes his dissent. Pursuant to the Report and Recommendation, Frank J. Marcone, Esq, is hereby suspended from the Bar of this Court, for a period of four years from the date of this Order and until such time as he is

reinstated to practice law by the Supreme Court of Pennsylvania, whichever is later.

For the Court,
*Edward R. Becker*
-Chief Judge

Date: November 26, 1999
BRADFORD A. BALDUS*'

CHIEF

DEPUTY CLERK

IN THE UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

UNITED STATES OF AMERICA
V.
FRANK MARCONE

NUMBER

APPEAL

1842 of 99

APPEAL FROM A JUDGMENT
OF
CONVICTION FILED IN CASE
NO.98CR544-1 IN THE
EASTERN DISTRICT COURT
OF PENNSYLVANIA ON
OCTOBER 6,1999

APPELLANT'S
MOTION TO RECUSE
and
EITHER REAPPOINT A SUITABLE PANEL
or
REFER TO ANOTHER CIRCUIT

Frank J. Marcone, Esquire Pro se
2530 North Providence Road
Upper Providence, Pennsylvania 19063 (610) 565 3241 fax
(610) 627 2318 TO THE

HONORABLE, THE JUDGES OF THE THIRD CIRCUIT

COURT OF APPEALS:

The Appellant, Frank J. Marcone, Esquire, filing pro se, reluctantly believe it is necessary to file this Motion

Requesting the Court consider his request to recuse Judges Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee and Barry from participating in the decision to be rendered in the above captioned case. In support of the said Motion, the Appellant avers the following:

1. The Appellant presently has two personally embarrassing matters under consideration by the Third Circuit Court of Appeals, both involving personal issues. He has two other matters involving issues for clients which are presently affected by the actions of the Court.

2. The personal cases are as follows:

a. in re: Frank J. Marcone, Esquire. Misc. No. 89-8079

b. United States v. Frank J. Marcone. No. CR: 1842 of 1999

3. The subject matter of Misc. 89-8079 is the imposition of Attorney Discipline which results from a "reciprocal" discipline imposed by This Court and which, by Rules of This Court must be the same or identical as the discipline imposed by the Pennsylvania Supreme Court. The underlying sanction imposed by Pennsylvania was a four year suspension beginning on October II, 1989, vacated on July 16, 1990 and reimposed on July 6, 1995. The expiration date of that suspension was September 28, 1998. The Appellant believes and therefore avers the imposition of an additional period of suspension contradicts and is in violation of the law.

4. The second case, No. CR: 1842 of 1999 results from an appeal of a Judgment of Conviction from the Eastern District Court. On September 28, 1998, the date his suspension expired in Pennsylvania, the Appellant's license to practice law in the Eastern District Court was restored by an Order signed by Chief Judge Cahn in May of 1998. On October 8, 1998, the Appellant was charged with the misdemeanor offense involving late filing of three tax returns for 1990, 1991 and 1992. Those charges were filed in the Eastern District Court and the entire Bench recused upon request. That recusal was partially based upon the fact the entire Bench had recently voted on the reinstatement of the Appellant. The case was assigned for a bench trial to Judge Roderick R. McKelvie sitting in Wilmington, Delaware.

5. Following the precedence set by the Judges of the Eastern District Court, it is proper to recuse based upon the fact a vote had recently been conducted by the Board of Judges who were deciding on a matter of disciplinary involvement. In that case, the Board of Judges voted in favor of the Appellant. In this case, the Board of Judges has voted adverse to the Appellant thereby virtually requiring the Board of Judges recuse.

6. In March of 1999, the Appellant was found guilty of the charges and thereafter filed various Post Trial Motions. In October, 1999, the Appellant was sentenced and upon receipt of the judgment of conviction, the Appellant filed an Appeal in This Court, initiating case number 99-1842 which has now been submitted to a panel for a decision. The Appellant had requested and received both Appeal Bail and "expedited" status.

7. In case entitled, In re: Frank J. Marcone, Esquire, No. 89-8079, This Court, by an Order dated November 26, 1999, ( A copy is attached hereto.) Suspended the Appellant from practice before this Court for an additional four year period beginning on November 26, 1991 and for an additional four year period beginning on November 26, 1999 and thereafter indefinitely unless the Appellant is readmitted to the Pennsylvania Supreme Court, whichever is later. That suspension is not a "reciprocity" suspension and has been imposed without cause or reason. It is in violation of the Rules of This Court, disciplinary practice and the law as pronounced by the United States Supreme Court. The imposition of such a sanction requires the Appellant to seek relief by opposing the action of the Board of Judges and thereby becoming completely adversarial to all the

Judges who voted in favor of the sanction. This circumstance has clearly created a conflict which requires a sua sponte recusal.

8. The imposition of that suspension required an independent series of procedures in which Judges Sloviter, Greenberg and Cowen participated as members of the Standing Committee on Attorney Discipline. Those proceedings have created an appearance of bias and prejudice since the proceedings are without precedence, were initiated entirely by Judges Sloviter, Greenberg and Cowen and resulted in a Report and Recommendation which unfairly has recommended the entire Bench adopt the recommended sanction and impose a suspension which has no basis and is in violation of the law. Before any disciplinary proceedings may occur, there must be charges

filed against the attorney. In this case, the suspension which has been imposed has been "labeled" as one based upon reciprocity. The "labeling" does not render it a reciprocal suspension for it is an entirely separate and independent sanction completely unrelated to the sanction imposed by the Pennsylvania Supreme Court. That suspension expired on September 28, 1998 and there is no jurisdictional nexus to again suspend for the same charges.

9. Judges Sloviter, Greenberg and Cowen recommended the imposition of the additional four year suspension with the second requirement that the Appellant must serve that four years even if he is readmitted to the Pennsylvania Supreme Court during those four years. That recommendation contradicts a prior 1989 Report and Recommendation made by Judges Garth, Sloviter and Greenberg in 1989, wherein the Standing Committee then recommended a "reciprocal suspension" beginning on October 11, 1989 and terminating either when the Appellant was readmitted to the Pennsylvania Supreme Court, or when the four years expired, whichever was earliqr. The current suspension therefore has no basis being entitled a "reciprocal" suspension and requires the Appellant immediately initiate an effort to set aside or terminate the suspension. That may require engaging each Judge as a party litigant which clearly would require sua sponte recusal.

10. The Appellant had filed Exceptions to the Report and Recommendation which was filed by the Standing Committee of Judges Sloviter, Greenberg and Cowen in September 1999. In a separate letter to Chief Judge Becker,

Appellant's disciplinary counsel, Mr. Robert Greenbaum, Esquire, specifically requested that the "disciplinary" case be held in abeyance until the completion of the criminal appeal specifically to avoid any need to request a recusal. In that letter dated October 19, 1999, (A copy is attached hereto.) Mr. Greenbaum also asked that Judges Sloviter, Greenberg and Cowen recuse from considering the issues in the criminal case since it appears they have become adversarial with the Appellant. The Appellant has also personally made a request the "disciplinary" matter be held in abeyance until the completion of the criminal case. That request was in paragraph 27(A) of the Petition to Vacate a Summary Suspension and Response to the Rule to Show Cause filed with the Clerk of the Third Circuit Court of Appeals on June 13, 1999. A copy of that Pleading is attached hereto.

I 1. The Appellant believes and therefore avers that a separate consideration and decision made by three Judges of This Court becomes adversarial when the respondent attorney in a discipline matter must oppose the Report and Recommendation made by that panel of Judges. The result of the Report and Recommendation made by the Panel of Judges Sloviter, Greenberg and Cowen urges that the remaining members of the Bench adopt the conclusions advocated by Judges Sloviter, Greenberg and Cowen. That conclusion becomes suspect when there is no explanation given whereby the Standing Committee has not attempted to explain the variation between the Recommended reciprocal suspension in 1989 in comparison to the "draconian" suspension urged upon the Board of Judges. Further, that conclusion advocated by Judges Sloviter, Greenberg and

Cowen, is in direct conflict and contradiction with the conclusion urged by the Exceptions filed by the Appellant through his counsel. Further, the presence of Judges Sloviter, Greenberg and Cowen during the considerations of the issues contained in the Report and Recommendation without also providing the Appellant with an equal opportunity to participate during discussions related to the vote to either adopt or reject the Report and Recommendation, give at least an appearance of unfairness and a lack of due process.

12. The actions taken by Judges, Mansmann, Scirica, Nygaard, Alito, Roth, McKee and Barry in adopting the conclusion advocated by Judges Sloviter, Greenberg and Cowen, thereby prevent them from participating in the decision considering the issues being presented during the above captioned appeal.

13. Among other factors which are the basis for the requested recusal are the following:

a.) The Appellant sought both appeal bail as well as an expedited Appeal. Those Motions were granted by Judges Garth, Alito and Nygaard..

b.) Simultaneously, a briefing schedule was set requiring the Appellant file his brief fourteen days after the Order. The Govemment's brief was due fourteen days thereafter and then seven days later the Appellant was to file his Responsive Brief.

c.) Argument was scheduled on December 16, 1999 before an unannounced panel of Judges.

d.) By letter dated December 1, 1999, from the Clerk of the Third Circuit Court of Appeals, the Appellant was informed the panel assigned to decide the criminal case issues will be Judges Mansmann, Greenberg and McKee. Also, the Appellant was informed the panel had already decided there would be no argument and the issues would be submitted on briefs. By the applicable Rules, such a decision was not "ripe" for consideration until all briefs were reviewed. When the decision was made to deny oral argument, the only brief which had been filed was the Appellant's brief.

e.) The Appellant's Brief raised issues which should compel an acquittal on the state of the record based upon the factual findings of Judge McKelvie.

All the existing case law compels a reversal. Further the Appellant has raised an issue of prosecutorial misconduct in the Grand Jury proceedings which must be reviewed and could result in the Indictment being quashed. The Appellant has raised issues of evidence which was disclosed to him by IRS after trial, which modify the entire

motive theory of the case, requiring a new trial be ordered if other relief is not provided. The Appellant has raised serious issues there were related to the calculation of tax loss for the purpose of the imposition of a sentence. All these issues would require argument. The fact the panel has prematurely made the decision to take the case on briefs without at least having the opportunity to fully review all issues is unprecedented and gives at least an "appearance" of prejudgment which requires recusal. The presence of Judge Greenberg on the assigned panel and the immediate predetermination that argument is not permitted, also gives at least the appearance that he may have influenced the remaining members of the panel adverse to the interests of the Appellant. Such a reservation should not exist in any case which is being decided in a serious issue and the Appellant is promised more as a litigant in This Court. He should not have to feel the panel may be prejudiced against him as a result of matters outside the case before the panel deciding the issues.

14. The incident which formed the only basis for the imposition of the suspension by the Pennsylvania Supreme Court resulted from an accusation that while the Appellant had surrendered a $2,000 bail refund to a complainant, the delay of approximately eight months was sufficient to cause him to be suspended for a four year period. That alone was unusual and harsh. The "bail" incident occurred in 1986 almost fourteen (14) years ago and Judges Sloviter, Greenberg and Cowen have "resurrected" an incident which is ancient and have advocated the remaining members of the Bench impose a

severe sanction of an additional four year suspension from practice. That suspension would result in the Appellant's earliest opportunity to practice law would occur in late 2003 when he was 68 years old. The affect of this is draconian and the result alone would leave a reasonable man with grave doubts over the motivation of such a terrible punishment. That punishment becomes more draconian when it appears there is no current basis for such a destructive and mean spirited act. The advocacy of such a sanction alone carries an appearance of prejudice and bias requiring a recusal of any judges who have advocated or adopted such a sanction which has no underlying accusation.

15. Now, the Clerk of the Third Circuit proposes to notify all other jurisdictions of the imposition of this "new suspension".[14] That will trigger reciprocal suspensions in all other jurisdictions and will prevent the Appellant from practicing law anywhere.

This compels the Appellant to seek relief by seeking review in the United States Supreme Court. That effort will compel challenging the actions of Judges Mansmann, Sloviter, Mansmann, Greenberg, Scirica, Nygaard, Alito, Roth, McKee and Barry and thereby will bring him into direct personal conflict with the Judges assigned to hear his case. This will require a sua sponte recusal.

16. The actions above have not been provoked by

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14 See the attached letter of Bradford A. Baldus, Chief Deputy Clerk of the Third Circuit Court of Appeals dated December 7, 1999.

the Appellant who in fact had taken steps to avoid this outcome. He therefore may not be accused of attempting to search for a "favorable panel". The actions which have given rise to the requested relief do not include Chief Judge Becker nor Judge Rendell who apparently did not vote in the Suspension issue.

17. The Appellant is entitled to oral argument and requests the additional option to chose to personally argue the issues pro se. He is therefore requesting either a new panel be formed and assigned exclusive ofjudges who are ineligible to decide this case. If it is impossible to form a suitable panel from the Third Circuit, the Appellant then requests the Court refer the case above captioned to the Circuit Judge of the United States Supreme Court for purposes of reassignment to another Circuit for completion.

WHEREFORE, the Appellant respectfully prays the Court enter an immediate Order recusing Judges Sloviter, Mansmann, Greenberg, Cowen, Scirica, Nygaard, Alito, Roth, McKee and Barry from participating in the further action in the above captioned appeal. Further, the Appellant requests oral argument with the option of personally participating in a pro se capacity and if it is impossible to properly form a panel from the Third Circuit, then, to refer the entire matter to the Circuit Justice for the United States Supreme Court for purposes of reassignment to another Circuit.

Respectfully submitted,

Frank J. Marcone, Esquire pro se. Appellant. -
December 9, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA

V.

FRANK MARCONE

APPEAL

NUMBER

1842 of 99

APPEAL FROM A JUDGMENT OF CONVICTION FILED IN CASE NO.98CR544-1 IN THE EASTERN DISTRICT COURT OF PENNSYLVANIA ON OCTOBER 6,1999

APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF THE APPELLANT'S MOTION TO RECUSE

A Motion seeking a recusal of a judge or judges is not an unusual request. If the facts underlying the request warrant a fair concern on the part of the moving litigant, then, the motion should be filed to protect himself from the possibility of partiality which may affect a fair decision in a matter before the Court.

The basis for a request for recusal must not be specious. If there have been incidents which, if known to a reasonable man, would cause him to harbor doubts about the judges impartiality under the applicable standards, then the judge must recuse.- In re Larson, 43 F.3d 410, 415 (8t' Cir. 1994), Prudential Ins. Co. of America Sales Practices

Litigation, In re, 148 f3d 283 (3" Cir. 1998). A party seeking recusal need not show actual bias on the part of the court only the possibility of bias. Liteky v. United States, 5 10 U.S. 540, 553, 114 S. Ct. 1 147, 127 L.Ed.2d 474 (1994).

In determining whether a judge or judges should be disqualified based on appearance of judicial partiality, the reviewing court inquiry focuses not on whether a judge actually harbored subjective bias, but rather on whether the record, viewed objectively, reasonably supports the

appearance of prejudice or bias. Antar in re 71 F.3d 97, (3dCir. 1995).

This Motion is filed with great reluctance. The Appellant is an attorney with matters which must be considered by, the members of the Bench which he is currently attempting to recuse. He attempted to avoid Such an action when he twice suggested that the pending disciplinary litigation, which had no basis in current complaints, was placed before the Court. He recognized that an adverse decision would provoke this action and tried to delay the decision in that case to prevent this from occurring. Unfortunately, his requests were ignored and now the facts, especially in light of the two requests for delay, virtually compel this Motion.

In United States v. Antar, 53 F.3d 568 (3 d Cir. 1995), ("Antar II,") this Court held a statement made by the trial Judge, during sentencing which said: "My object in this case from day one has always been to get back to the public that which was taken from it as a result of the fraudulent activities of this defendant and others." 53 F.3d at 573. This statement was dispositive in overturning convictions of two of the relatives of the principal defendant simply because this Court decided that the statement created the appearance of prejudice. As noted in Antar, in re: (supra), this Court said:

"Because we seek to protect the public's confidence in the judiciary, Our inquiry focuses not on whether the judge actually harbored subjective bias, but rather on whether the

record, viewed objectively, reasonably supports the appearance of prejudice or bias'...In making this determination, we remain ever mindful that attacks on a judge's impartiality may mask attempts to circumvent that judge's anticipated adverse decision.'...We are also cognizant that our rulings in these matters keenly affect the conduct of judges and parties in all disputed matters before the district courts..."

The Federal Recusal Statute, 28 U.S.C. § 455 (b), imposes a general duty on a federal judge to recuse whenever there is an appearance of judicial partiality: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In Liteky v. United States, 5 1 0 U.S.540, 114 S.Ct.

Citing Antar II, 53 F.3d at 574, United States v. Bertoli, 40 F.3d 1384, 1412 (3" Cir. 1994); Alexander, 10 F.3d at 162; Haines v Liggett Group Inc., 975 F.2d 81, 98 (3rd Cir. 1992)

Citing Alexander v. Prime America Holdings, 10 F.3d at 162., 127 .F2d 474 (1994), the Supreme Court made clear that the ultimate issue for recusal is the appearance of a wrongful or inappropriate bias or prejudice. The Court stressed the importance of extrajudicial source doctrine in assessing a judge's unfavorable disposition toward a litigant. The most critical factor imposed by the Supreme Court was not the Source of the judge's prejudicial knowledge or bias, but rather the " judge's inability to render fair Judgment"

Citing from Justice Kennedy's concurrence in Liteky (supra), This Court adopted his language which concluded that a 'udge abiding by his oath..."approach every aspect of each case with a neutral and objective disposition."

In Antar, in re: (supra), This Court concluded that the judicial mandate required tile Judge to "provide a fair

trial and impartial forum for the litigants before him. This is a basic requirement of due process. Antar, in re: at 71 F.3d 102. In that case, This Court found comments which evidenced a possible predetermination of a factor in the case required recusal.

The actual bias or prejudice of a judge or judges is not the test for deciding to reassign a case. Rather, the Court of Appeals must preserve reality and appearance of proper functioning of judiciary as neutral, impartial administrator of justice. Whenever a Judge's impartiality might reasonably be questioned in a proceeding 28 U.S.C. § 455 (a) commands the judge to disqualify himself sua sponte in that proceeding. For purposes of a § 455 (a) disqualification, it does not matter whether the judge actually harbors any bias against a party or a party's counsel. This is so because § 455 (a) concerns not only fairness to individual litigants, but equally important, it concerns the "public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before aj udge or judges who appear to be tainted." To satisfy its highest function, justice must satisfy the appearance of justice. Alexander v. Primeamerica Holdings, Inc., 10 F.3d 155 (3d Cir. 1993), In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). As in Alexander v. Primeamerica Holdings, Inc., (supra), this case would be ever shrouded in suspicion" if the members of the Bench who have voted to sanction the Appellant were to continue to preside as deciders of the issue in the above captioned case.

Certainly recusal is not uncommon. For example, in 1999, in A.S.Goldman & Co., Inc. v. New. Jersey Bureau Of Securities. 163 I-. ')d 780, (3" Cir. 1999), Judge Roth was obligated to recuse herself after argument but before clearance of the Opinion. Judge Alito took Judge Roth's place upon reconstitution of the panel and re-argument.

In Blanche Road Corp. v. Bensalem Tp. 57 F.3d 253, (3rd Cir. 1995), 'This Court held that a judge should recuse himself where reasonable men, knowing all the circumstances, would harbor doubts concerning the judge's

impartiality. That would not apply simply if a 'Judge displays occasional courtroom signs of anger. That is classified as non external source requirement. Therefore, if a Judge during trial evidences a series of incidents which are explained by human failing, then recusal is not specifically necessary. Should the Situation change and the complained of incidents, as here, occur outside the context of a courtroom confrontation in which manifestations of "anger", "criticism" or "impatience or frustration," do not necessarily warrant recusal. Take the judge out of the courtroom setting as in this case, and the perception of actions such as shown here, demand recusal. Under 28 U.S.C. § 405(a), recusal is required whenever a judge's impartiality "might reasonably be questioned."

On the "flip side" of this issue however is the acknowledgment that perception of a justice system requires recusal whenever a reasonable man might harbor thoughts or favoratism or bias from what he observes. Here, the Appellant has been the continuous subject of "unusual" legal proceedings, all before Judges. In this case for instance, the Judge found him guilty after virtually acquitting him by concluding the Government's evidence had convinced him at most the Appellant was "negligent". Every case says negligence in a criminal tax case cannot support a verdict of guilt. In this case an experienced trial judge, from the Bench said he was applying a "conclusion of intent" and then testing the conclusion by applying "negligence" to the conclusion to determine if negligence could overcome the "conclusion of negligence". When the basic "Criminal law #1 01 " precepts are ignored by a federal trial judge, paranoia and suspicion set in. Combine that with a continuous violation of the Rules of the Court and the Rules of law when applied to the Appellant, it is no wonder almost to a man, the universal comment is "someone must be out to get you" is repeated over and over. That is enough to satisfy the test of what is being perceived by the "reasonable men".

In this case, Judges Sloviter, Greenberg and Cowen convened to hear a response to the Rule to Show Cause which had been filed by Judge Greenberg on August 12, 1998. In 1990, Judge Greenberg had been part of the same panel which had notified the Appellant that he would be subject to a suspension which began on October 11, 1989, unless he filed exceptions to the Report and Recommendation. The Appellant did not file any exceptions and by the Rules, that suspension went into affect as an Order of the panel of the Court.

Then in 1995 the Appellant notified the Court of his suspension on at least eight separate occasions. Judge Greenberg however chose to ignore the earlier notices and chose to drastically modify the recommendation to impose a suspension which violated the Rules because it was neither "identical" or the "same" as the suspension upon which this reciprocal suspension was based. The Appellant appeared and testified that he attempted to follow the provisions of the Rules and had carefully not practiced law before the Third Circuit because it appeared to him that to do so would be to show "disrespect" for the Court Rules as he saw them. Judge Greenberg however, acting in an adversarial capacity, apparently convinced the other members of the bench to ignore the Rules dealing with the "immediate and automatic" suspension imposed without the requirement that an Order be signed by the Court and to impose a suspension which not only is draconian, but is in violation of the United States Supreme Court rules which do not require admission to a state court as a prerequisite to readmission to a federal court. There is absolutely no basis for such a ruling and the fact the Order was approved would leave any reasonable man with a concern that the Court was not unbiased and not prejudiced. A litigant, seeking proper review in the Courts should not be forced to be fearful that the judges involved in deciding the issues are not unbiased nor either unfairly or even fairly prejudiced. The appearance of prejudice suffices to require recusal.

The Order which has been adopted by the members

of the Bench is in conflict with the law spoken by the Supreme Court wherein in Theard v. United States, 354 U.S.278, 77 S.Ct 1274 (1957), Mr. Justice Frankfurter reviewed and decided on the issue of whether a Federal District Court must follow the lead of State Courts in disciplining attorneys who practice before them. He stated:

"While a lawyer is admitted into a federal court by way of a state court, heis not automatically sent out of the federal court by the same route. The two Judicial systems of courts, the state Judiciaries and the federal Judiciary have autonomous control over the conduct of their officers, among number, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court."

In Selling- v. Redford, 243 U.S. 46, 37 S.Ct. 177, 61 L.Ed. 585, the Court continued by observing that "disbarment by federal courts does not automatically flow from disbarment by state courts." Clearly therefore, the United States Supreme Court has dictated there is a separate and distinct determination to be made by the federal courts when asked to examine the activities of one of it's Bar members, for purposes of imposing discipline. It is therefore axiomatic that the same separate and distinct determination must be made by the federal court in determining whether the term of suspension imposed should be terminated.

On March 29, 1989, Judge Greenberg directed a letter be sent to the Appellant's lawyer in the pending discipline case. The docket entries reveal the following:

> "March 29 Order (Sloviter, Greenberg,[15] Garth CJ) granting hearing to take place on May 30, 1990 at 3:00 p.m. on 19" Fl. Of the

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15 This underlining appears on the original and apparently designates the author of the entry.

U.S. Courthouse. Further ordered, at hearing, Court will not reexamine finding of Supreme Court of PA, And Clerk shall mail copy of this order to Frank J. Marcone at least 30 days prior to hearing, and Mr. Marcone, on or before May 18, 1990, will file acknowledgment of receipt of order, and he or his attorney may file a preheating memo not to exceed 30 pages. (dh)"

It therefore appears the Hearing Committee of This Court has never examined the record of the underlying disciplinary case. This is in direct violation of the Rules of This Court and has been a partial reason for the incorrect findings of the entire Bench. Most important however is the evidence of a lack of due process which has been adopted by the members of the Bench who decided the suspension issue. The Rules provide that the respondent attorney may; and in this case, the Appellant did, raise the issue pursuant to Rules of Attorney Discipline Rule 10 (5)(a),(b), (c) and (d) (in 1989 and again in 1998.) The Standing Committee has never adhered to that Rule and has never examined the fact that the Hearing Committee in the Disciplinary proceedings in Pennsylvania decided the $2,000 fund was part of the Appellant's fee and that the entire disciplinary proceedings were based upon a fabrication. Under those circumstances, no reciprocal suspension should be imposed and therefore any suspension in this Court lacks the requisite due process and must be voided. The Appellant may be relegated to bringing an action for Mandamus in the United States Supreme Court naming as parties all the judges who consented to the entry of the suspension Order. This alone requires recusal for it creates a "chill" upon any consideration where the parties involved in deciding an issue are in direct personal conflict with a litigant in parallel litigation.

Prudential Ins. Co. of America Sales Practices Litigation, in re: (supra) goes further and concludes, citing

the United States Supreme Court in Liteky (supra) concluded that if the court reveals a high degree of favoritism or antagonism as to make fair judgment impossible, and if a reasonable man, were he to know all the circumstances, would harbor doubts about the judges impartiality, under the applicable standard, then the judge must recuse. Certainly a vote to essentially prohibit an attorney to forever practice before the Court when he has never been even cited for an infraction of the Rules of the Court, must give rise to such a doubt about the Judge's impartiality and cause a reasonable man to harbor doubts of bias. Under that applicable standard, then the judges must recuse for to deny the requested relief would always leave the outcome of this case shrouded in suspicion if the decision were adverse to the Appellant.

Therefore, under the current state of the record it appears all of the members of the Bench now at least appear to have a prejudice against the Appellant and he is entitled to have the entire Bench who decided against his interests, recused.

Respectfully submitted,

Frank J. Marcone, Esquire
pro se
Appellant

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In the Matter of
Frank J. Marcone, C.A. Misc. Record No. 89- 8079 an attorney at law

Affidavit o f Charles W. Johns

I, Charles W. Johns, having been duly sworn, do depose and say, on my own personal knowledge as follows:

I . I am the Prothonotary of the Pennsylvania Supreme Court.

2. 1 held this position prior to and during 1995 and all times since that date.

3. Among the responsibilities of the Prothonotary's office is the dissemination of copies of disciplinary actions taken by the Pennsylvania Supreme Court. Such dissemination is made for the purpose of notice.

4. The notices are sent to the United States District Court for the Eastern District of Pennsylvania, the United States Court of Appeals for the Third Circuit, the National Discipline Data Bank maintained by the American Bar Association, as well as a variety of courts and other interested entities within the Commonwealth of Pennsylvania.

5. It was in 1995, and continues to be, our practice to send such notices pursuant to our general operating rules and procedures.

6. The docket in the matter of Frank J. Marcone, No. 690 Disciplinary
Docket No. 2, Disciplinary Board No. 16 DB 88 reflects that notices of the suspension imposed on July 6, 1995 were duly sent.

Further, the affiant sayeth naught.

Charles W. Johns

Sworn and sealed before me
this 24th day of September 1999.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In the Matter of
Frank J. Marcone, C.A. Misc. Record No. 89- 8079 an attorney at law

Affirmation of Seth Rosner

1, Seth Rosner, an attorney-at-law admitted to the bar of the State of New York, affirm under penalty of perjury as follows:

1 . I am an attorney-at-law admitted to practice before all courts of record of the State of New York since December 1955. 1 am admitted to the bars of the Supreme Court of the United States and of the United States District Courts for the Southern and Eastern Districts of New York and of the Eastern District of Kentucky. I have been engaged in the private practice of law continuously since 1955 except that from April 1956 to July 1959, I was an officer on active duty in the United States Navy and from September 1959 to June 1961, 1 was a Ford Foundation Fellow in Civil Law at New York University School of Law and at the Law Faculty of the University of Paris. I have been engaged in general practice with a concentration in business law and in legal ethics and professional conduct.

2. From 1961 to 1989, I was Adjunct Professor of Law at N.Y.U. Law School. I presently serve as a member of the Board of Governors of the American Bar Association ("ABA"). I recently served as a member of the Working Group of the Conference of Chief Justices on the National Study and Action Plan Regarding Lawyer Conduct and Professionalism and as a member of the Professional Education Project of the Chief Judge of the Court of Appeals of the State of New York. I have served as Chair of the ABA Standing Committee on Professionalism and of the Standing Committee on Lawyer Competence, and as President of the Association of Professional Responsibility Lawyers. Including service on the two above-mentioned ABA Standing Committees, my cumulative service on ethics, professionalism and professional responsibility committees of the

ABA, the New York State Bar Association, the Association of the Bar of the City of New York and the New York County Lawyers Association total almost forty (40) years.

3. I submit this affirmation in connection with the consideration by this Honorable Court of the recommendation of its Committee to continue the suspension of Frank J. Marcone from the practice of law before the Court.

4. I have read the Exceptions to the Report and Recommendation of the Standing Committee on Attorney Discipline herein and in fact have discussed in detail with Mr. Marcone the facts and proceedings underlying his suspensions by the Pennsylvania Supreme Court, by the United States District Court for the Eastern District of Pennsylvania and by this Court.

5. There are two aspects to the Report and Recommendation which, with great respect to this Court, I would like to address: the sanction itself and the condition of termination of the sanction by readmission to the state bar, or admission elsewhere.

6. Concerning the sanction itself, the Committee proceeded based on the portion of the Rules of Disciplinary Enforcement that permits reciprocal sanction based on the findings of and penalty imposed by the state authorities, in this case the Pennsylvania Supreme Court. Although the length of the recommended suspension is four years, the same number of years imposed by Pennsylvania, the timing of the sanction of this Court makes it dramatically more severe.

7. As I understand them, the intent of the provisions for reciprocal sanction set forth in Rule 3.1 of the Rules of Disciplinary Enforcement, Third Circuit Court of Appeals, is to impose the same sanction during the same time frame so that a lawyer's practice before all courts is equally restricted. Additionally, the purpose of the identity of the reciprocal sanction is to assure that the judicial system as a whole is unifon-n in

regulating the conduct of lawyers.

8. This is reasonable and logical, particularly since courts ordinarily do not undertake independent investigations and fact finding in the context of a reciprocal sanction. In relying upon the process of the sister jurisdiction, the court assumes that the original sanction imposed is appropriate given the circumstances of the particular case.

9. The recommendation of the Committee appears to me to run counter to the intent and purpose of the rule of reciprocity. It has the practical effect of doubling the Pennsylvania sanction from four years to eight years. This is an incongruous result for a sanction based on the provisions permitting reciprocity.

10. I am unaware of instances of similar incongruity in the imposition of reciprocal sanctions where the second (reciprocal) sanction begins after the termination of the initial suspension and terminates years later.

11. Other rules of the Circuit certainly permit an independent analysis of the facts, but the Committee did not follow that course of action, relying instead on the provisions for reciprocal sanction. Having made that decision, I would respectfully suggest that the appropriate choice of sanction for this Court is to impose the same term of suspension running concurrently with the four years of the Pennsylvania suspension.

12. Concerning the second aspect of the Report and Recommendation, the Committee recommends that the suspension, if one is imposed, should continue until Mr. Marcone is readmitted to practice in Pennsylvania or is admitted to practice before the bar of some other state.

13. This recommendation is premised on the fact Mr. Marcone's original admission to the bar of this Court was based upon admission to practice in Pennsylvania. Although it is common for lawyers to be admitted to federal practice based on their admission to a state bar, loss of the privilege of practice

before that bar does not automatically lead to the loss of the privilege of practicing in the federal system. In fact, the very disciplinary rule that permits reciprocal sanction makes it clear that the federal court controls the grant of the privilege to practice before it. This independence highlights the fact that once a lawyer is admitted to practice before the federal court, the privilege is no longer derivative of the state bar admission.

14. The rules contemplate circumstances where the federal court may want to impose no sanction, a less restrictive penalty, or a more severe discipline. However, this divergence only functions appropriately if there is independence from the state bar admission and disciplinary process. The recommendation is contrary to this very independence.

15. It is my understanding that once the term of a suspension has expired, federal courts, on motion of the lawyer, normally grant readmission to the federal bar, without examining whether the lawyer has applied for or been granted readmission to the state bar that originally imposed the suspension. Again, this process is based on the independence of the federal court to regulate the lawyers practicing before it. Requiring that Mr. Marcone be readmitted to the bar of Pennsylvania or any other state, as a precondition to his readmission, departs from what I understand to be the normal procedure for readmission to a federal court.

16. Given the unusual nature of the charge involved in the proceedings and the outcomes in the state disciplinary matter, I find it very difficult indeed to differ with U.S. District Judge Dalzell. I most respectfully suggest that the Court temper it's judgment with fairness, justice and mercy, and credit Mr. Marcone for the time period of his suspension previously served. Should the Court be disinclined to do so, I respectfully urge that the Court, in fairness, conduct a *de novo* hearing on the original complaint.

Affirmed this 14' day of October.1999

Seth Rosner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
IN RE: FRANK MARCONE

MISCELLANEOUS

NO. 95-71

FILED JAN 2 2 1996

REPORT AND RECOMMENDATION

Dalzell Dissenting

I reluctantly part company with my colleagues in this matter because of the abiding unease I feel upon reading and rereading the record in this case. This substantive record, together with the disquieting procedural history, leads me to conclude that Mr. Marcone's unquestioned 1986 misconduct warrants "substantially different discipline"[16] from what the Pennsylvania Supreme Court finally imposed on July 6, 1995.

When Mr. Marcone on October 25, 1989 filed his petition for reconsideration and reargument after the Supreme Court's October 11, 1989 four-year suspension order, the only case his counsel cited was Commonwealth v. Valderrama, 479 Pa. 500, 388 A.2d 1042 (1978), to support his request that the Supreme Court reconsider the Order, "and remand this matter to Hearing Committee 2.01 for additional testimony." Petition for Reconsideration at 6 (emphasis added). Specifically, Mr. Marcone's counsel represented that the

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16 ~~1~~. Rule II.D.4 of Local R.Civ.P. 83.6.

newly discovered information could not have been obtained at or prior to the conclusion of the (1988] Hearing due to Marcone's diminished mental capacity" and that this newly discovered evidence would show "that the $2,000 was a fee which should never have been returned to Giblin.11 at 5-6, 11 and 13. Notably, Mr. Marcone's counsel only sought "a stay of this Court's October 11, 1989 order to permit full consideration of this petition." at 7 (emphasis added).

In one sense, the Supreme Court on July 19, 1990 gave Mr. Marcone more than he requested in his petition in that it "vacated" the October 11, 1989 order, and did not "stay" it. Pertinent to the procedural mystery of this case, however, the Supreme Court, taking up the exact language of Mr. Marcone's petition, remanded the matter to the Disciplinary Board "for additional testimony", precisely as Mr. Marcone had requested.

Although Mr. Marcone had asked for a remand to the original Hearing Committee, the Disciplinary Board referred the matter to a new one which held evidentiary hearings on February 25, February 26, May 13 and August 8, 1991. The Committee also received into evidence the videotape deposition of Dr. Paul J. Fink on May 6, 1991.

Based upon the testimony of both Dr. William O'Brien, the psychiatrist who treated Mr. Marcone in 1986, and Dr. Fink, whose tests revealed physical neurological impairment, the second Hearing Committee unsurprisingly found Mr. Marcone's mental infirmities constituted "sufficient mitigating factors that should be weighed in the final consideration of a punishment in this matter." Report of Hearing Committee 2.02 at 26. The degree of Mr. Marcone's

mental illness at the time of his lapses of professional conduct is illustrated in Finding 18, where the

committee found that he in "April, 1986 . . . became suicidal.,' It is also of more than passing interest to note that, on the merits, Hearing Committee 2.02 concluded that the bail money in question constituted funds to which Mr. Marcone was entitled as a fee. @ at 25. Indeed, it was only "subsequent to testing and treatment by Dr. Fink" that Mr. Marcone was able to recall the facts, and find the documents, that enabled him in 1991 to become "aware of the fact that the bail money was to be part of the fee .in this matter and that that was the reason he accepted the bail assignment". Id. at 21.

It is important at this point to contrast the hearings that took place in 1988 with those that were held in 1991. Of crucial significance, in my view, is that Mr. Marcone represented himself in 1988, but was represented by counsel in 1991. Hearing Committee 2.02 found, at Finding 45, that Mr. Marcone "was not competent to testify in 1988 at his hearing". If he was "not competent to testify", a fortiori he was not competent to represent himself in that proceeding.

The Disciplinary Board, in its opinion by member Thomas A. Leonard, made its surprising reversal in 1995. In so doing, it ignored this critical finding of Mr. Marcone's incompetence, and rejected all the other findings based upon the four days of testimony that Hearing Committee 2.02 heard pursuant to the Supreme Court's July 19, 1990 mandate to receive "additional testimony."

Ironically, the Leonard opinion came to its surprising result in the name of the Valderrama case that was the sole decisional predicate for the relief Mr. Marcone successfully sought from the Supreme Court in 1989 [2] while the Supreme Court of Pennsylvania is at liberty to ignore proceedings and findings that were held at its direction, I believe that the same course on our part would lead to a "grave injustice".[3]

An analogy will, I hope, explain why I come to this conclusion. If, instead of a disciplinary proceeding, Mr. Marcone in 1988 had appeared in a change of plea proceeding in state court, representing himself, and plead guilty when he "was not competent to testify" or to represent himself, I am confident that every member of this Court would grant his motion under 28 U.S.C. S 2254 to vacate that plea if the Pennsylvania courts did not vacate it first. See, e.g., Godinez v. Moran, 113 S. Ct. 2680, 2686-87 (1993) (equating competency standard for waiver of representation and capacity to plead guilty). It is therefore at

2. See Report and Recommendation of the Disciplinary Board of the Supreme Court of Pennsylvania 11 ( April 4, 1995). The Leonard opinion's statement, at the cited page, that Mr. Marcone's "quest to meet the Valderrama test fails at the outset" is irreconcilable with the reality that Mr. Marcone delivered to the second Hearing Committee precisely what he promised to the Supreme Court in his successful 1989 petition for reconsideration. See id. at 5-6 (the "newly discovered information could not have been obtained at or prior to (the 1988 hearing) due to Marcone's diminished mental capacity . . . [and] the $2,000 was a fee . . . . 11). While my two colleagues seem content to leave this anomaly to the mysteries of the Pennsylvania Supreme Court's unexplained action, I cannot, for the reasons that follow, so rest.

3. Rule II.D.3 of Local R.Civ.P. 83.6.

a minimum counter-intuitive for me to accept the tainted 1988 record, but jettison the far more extensive and (in my view) unimpeachable 1991 record, as the Disciplinary Board and the Supreme Court of Pennsylvania did in 1995.

I hasten to add that I agree with Hearing Committee 2.02 that Mr. Marcone "still failed to promptly notify (his] client of the receipt of funds" as well as "failed to properly maintain record of funds . . . and render an appropriate account of the client regarding them." Report of Hearing Committee 2.02 at 25. Such conduct warrants sanction, and this Court did, in fact, impose a sanction when Chief Judge Fullam on November 30,1989 suspended Mr. Marcone effective on that date.[4] He was suspended, it will be recalled, until Chief Judge Bechtle vacated the suspension order on August 16, 1990. Thus, Mr. Marcone has already suffered suspension in this court for ten months and five days, a more than ample sanction for the notice and recordkeeping violations Mr. Marcone committed in 1986, albeit when he was suffering a severe mental dysfunction. This already-served sanction more than suffices to vindicate this Court's interests in protecting the public and in deterring other counsel from being equally cavalier.[5]

4. Chief Judge Fullam's 1989 statement that "the state disciplinary proceedings were fairly conducted" was of course made before any state fact-finder held that Mr. Marcone was incompetent at his 1988 proceeding.

5. It is worth noting here that on December 22 we heard the testimony of five witnesses, all well-acquainted with Mr. Marcone, who had high praise for his professional abilities and

(continued...

While I also agree that, as a general matter, we should, as our Rule on its face recognizes, "impose the identical discipline" imposed by a sister court, that same Rule contemplates that we do not march in lockstep with other tribunals. Indeed, only recently, in a proceeding with my Brothers Bartle and Padova, we imposed, in a reinstatement case, what was effectively a more severe sanction than the Supreme Court of Pennsylvania ordered. See In Re: Vladimir N. Zdrok, Misc. No. 94-176 (November 17, 1995). Thus, whatever weight the Majority may give to the "principle of comity", typescript at 1112, both the text of our Rule and our practice under it demonstrate that this Court charts its own path of justice in these cases.

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5 ... continued) ethics. For example, former First Assistant United States Attorney Joseph Fioravanti, who has known Mr. Marcone for twenty years, first as an adversary and then as co-counsel in many criminal defense matters, described Mr. Marcone as "extremely honorable, forthright", and someone whom he would place "in the upper several percentiles" of the legal profession. The Speaker of the Pennsylvania House of Representatives, Matthew J. Ryan, who has known Mr. Marcone for twenty-five to thirty years as both a lawyer and friend, described Mr. Marcone as a "very skillful lawyer, very competent" whose only fault is that he sometimes "takes on more than he can handle". Speaker Ryan stated that he "positively" regards Mr. Marcone as "personally honest". Arthur Thomas Donato, Esquire, a lawyer in Media who has known Mr. marcone for at least twenty years, described Mr. Marcone as a ,'very competent lawyer" whose "personal honesty is beyond reproach".

The Majority's rehearsal of Mr. Marcone's "disciplinary problems", typescript at 5 n.2, is surely a recitation of ancient history. This conduct, some of it taking place almost twenty years ago, (a) received minor sanctions from the state and (b) is so old as to be of little weight when balanced against the testimony of contemporary observers.

Mr. Marcons was unfit to represent himself in 1988. In the 1991 proceeding he was not only competent,

but represented by counsel. My sense of justice will not allow the earlier proceeding to obliterate the later, and thus I respectfully dissent.

Stewart Dalzell *J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: FRANK MARCONE

MISCELLANEOUS

NO. 95-71

FILED December 9, 1997

REPORT AND RECOMMENDATION

Dalzall, J., dissenting DIP, Clerk

As I did on January 22, 1996, I must again express my abiding conviction that Mr. Marcone's four-year suspension from the practice of law, on the now-expanded record before us, constitutes the grave injustice that our local rule contemplates as the predicate for taking a different course from (in this instance) the Pennsylvania Supreme Court.

The testimony we received from Mr. Travis on October 28 only deepens the gravity of this injustice. Viewed in a light most favorable to the Supreme Court of Pennsylvania's Disciplinary Board, the record as to Travis's stepfather's entitlement to the bail money -- the keystone in the arch of Mr. Marcone's guilt -- is equivocal at best. In truth, Mr. Travis's recantation before us confirmed the factual finding of Hearing Committee 2.02 that the bail money in question constituted funds to which Mr. Marcone was entitled as a fee. See Report of Hearing Committee 2.02 at 25. Mr. Marcone therefore stole nothing from anyone.

Even if we accept the rationale of the Thomas Leonard April 4, 1995 reversal for the Disciplinary Board of Hearing Committee 2.02's recommendation, the testimony before us would surely be regarded as 4after-discovered evidence" within the ambit of Mr. Leonard's reading of Commonwealth v. Valderrama, 479 Pa. 500, 388 A.2d 1042 (1978). Clearly, Mr. Marcone would have had no basis in 1988 before the first Hearing Committee to anticipate that nine years later Mr. Travis Would completely repudiate his testimony before Hearing Committee 2.01

Thus, with the greatest respect for my colleagues on this panel, I must adhere to my dissenting view of this most disquieting case.

Stewart Dalzell, J.

OFFICE OF THE CLERK
SALLY MRVOS UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19106

August 10, 1990

Frank J. Marcone, Esquire
2530 North Providence Road
Upper Providence, PA 19063

Re: In The Matter Of
FRANK J. MARCONE
C-A. MISC. NO. 89-8079

Dear Mr. Marcone:

The Standing Committee on Attorney Discipline has considered your application for reinstatement which was received on July 23, 1990, and has also considered the order of the Supreme Court of Pennsylvania dated July 19, 1990, vacating the order of October 11, 1989. As it happens, the court has not as yet acted on the Report and Recommendation of the Standing Committee. Thus, You are not under suspension in this court and therefore the court has no need to act on your application for reinstatement.

Inasmuch as the matter is still pending before the Pennsylvania Disciplinary Board, this court will stay the proceedings until the completion of the Pennsylvania proceedings. Please advise the undersigned promptly when the Pennsylvania proceedings are completed.

Very truly yours,

SALLY MRVOS. Clerk

By: Elizabeth Walter Schiller Deputy Clerk

LAW OFFICES DOMENIC D. JEROME
327 West Front Street
Media, Pennsylvania 19063
610 891-4336
FAX (610) 566 -437,5

April 21, 1998

The Honorable Harvey Bartle, III
The Honorable Anita S. Brody
The Honorable Stewart Dalzell
United States Courthouse, Room 5918
601 Market Street
Philadelphia, PA 19106

RE: FRANK J. MARCONE

Dear Judges Bartle, Brody and Dalzell:

I have been advised that Frank J. Marcone, Esquire seeks re-admission to the practice before the Federal Courts for the Eastern District of Pennsylvania, I know your task is difficult and I offer to you my knowledge of Mr. Marcone.

I am now a retired trial Judge having served in Delaware County, Pennsylvania for over twenty-one years. In that capacity, I had many occasions to observe his demeanor and behavior, in addition, I came to know Mr. Marcone on a semi-social basis since we were members and supporters of the same community oriented organization.

As a trial Judge, I had occasion to discuss in a complimentary context Mr. Marcone's character, professionalism and reputation with other Judges and lawyers. I also knew Mr. Marcone when we were both practicing attorneys and once again since I have returned to the practice of law.

Mr. Marcone has consistently displayed by his demeanor a genuine respect for the Courts and the administration of justce. He always performed in a manner

which showed his high ethical regard for Judges, other attorneys and litigants. Other Judges and attorneys have confirmed this for he enjoyed an excellent reputation not only for his ethical behavior but as well for his adherence to candor and honesty.

Mr. Marcone's problem arose from taking too many cases. He proposed to change his area of trial work so as to minimize any possible future problems concerning his difficulty in being in too many cases and Court.

I am aware of the facts which led to his difficulties and, in my opinion, he was the victim of a miscarriage of justice.

Mr. Marcone has great trial skills and I continue to hold him in high regard and I urge you to allow him to return to the practice of law before Your Honorable Court.

Very truly yours,

DOMENIC D. JEROME

DDJ/cin

JOSEPH T. LABRUM, JR.
ATTORNEY AT LAW
SUITE 114
ROSE TREE CORPORATE CENTER
1400 NORTH PROVIDENCE ROAD
MEDIA , PENNSYLVANIA 19063
(6lO)565-1010 FAX (6lO)565-2526

April 20, 1998

Hon. Harvey Bartle III
United States Courthouse
Room 5614
601 Market Street
Philadelphia, PA 19106

Hon. Anita S. Brody
United States Courthouse
Room 3825

Hon. Stewart Dalzell
United States Courthouse
Room 5918

RE: Frank J. Marcone

Dear Judges Bartle, Brody and Dalzell:

I write, on his request, to recommend Frank Marcone's readmission to practice before the United States Federal Courts. I had previously written on his behalf, and restate my thoughts as before.

Mr. Marcone is possessed of the requisite moral qualifications, competency and learning in the law required for the practice of law, and in my opinion his resumption of the practice of law will not be detrimental to the integrity of the Bar or to ,he administration of justice or the subversion of the public interest.

I have known Mr. Marcone for upwards of thirty years, both as a colleague at the Bar and as an advocate before me as Judge of the Court of Common Pleas of Delaware County for twenty years.



Mr. Marcone's difficulties, if any he had, all arose from taking on more legal representation than one lawyer could handle. This demand for his services resulted from his outstanding skills as a trial lawyer and he has gradually come to overcome that difficulty of spreading himself too thinly.

believe Mr. Marcone's original suspension in the Pennsylvania Courts was a miscarriage and further discipline of him would only have a compounding effect.

Mr. Marcone is honorable and forthright and I hope you will be able to recommend his re-admission to the Federal Bar. If I can supply any desired personal comments, please call me.

Sincerely and Respectfully,

Joseph T. Labrum Jr.

JTL/mmp

MELVIN G. LEVY
ATTORNEY AT LAW

14 WEST SECOND STREET
P.O. BOX 229
MEDIA, PENNSYLVANIA 19063
(610) 565 3900 FAX (610) 565 8615

April 22, 1998

Hon. Harvey Bartle, III
Hon. Stewart Dalzell
Hon. Anita B. Brody
United States Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Frank J. Marcone
2350 North Providence Road
Upper Providence, PA 19063

Dear Judges:

This letter is written in support of the application of 'Frank J. Marcone for re-admission to the Bar of the United States District Court for the Eastern District of Pennsylvania.

During my service of 15 years from 1978 to 1992 as a Judge on the Court of Common Pleas of Delaware County, Pennsylvania, Mr. Marcone appeared before me on numerous occasions in both civil and criminal cases. I found him to be ethical and forthright in all of his dealings with the Court over which I presided. At no time were his honesty, ethics or other personal attributes questioned or in any manner deemed to be suspect.

During his years of practice, I found Mr. Marcone to he a very competent lawyer. As a matter of fact, I considered him to be one of the best trial lawyers to appear

before me. His skills as a courtroom attorney were excellent. In my judgment, his qualifications and competency in every respect were unassailable.

I am of the considered opinion that Mr. Marcone' s reinstatement as a member of the Bar of the United States District Court for the Eastern District of Pennsylvania would in no manner be detrimental to the integrity or standing of the Bar or to the administration of justice or subversive of the public interest. I urge Your Honors to give favorable consideration to Mr. Marcone's application for reinstatement.

Respectfully,

Melvin G. l,evy

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1842

UNITED STATES OF AMERICA

V.

FRANK MARCONE

Appellant

On Appeal from the United states District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 98-544-01)

---

BEFORE:MANSMANN, GREENBERG and MCKEE,,
Circuit Judges

ORDER

The motion by Frank J. Marcone entitled

",Application for a Stay of Proceedings in the Form of a

Motion for Stay of all Proceedings is denied.

BY THE COURT
*Morton I. Greenberg*
Circuit Judge

Dated: DEC 22 1999

"**Rule 10: Contested Proceedings**

5. A certified copy of a judgment or order demonstrating that a member of the bar of this Court has been ...suspended by another court is accepted as establishing that the conduct for which the discipline was imposed in fact occurred and that the discipline imposed was appropriate unless it appears:

(a) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) the there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion on that subject; or

(c) that the imposition of the same discipline by this court would result in a grave injustice; or

(d) that the misconduct established is deemed by the Court to warrant substantially different discipline."

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 99-1842
United States of America
v.
Frank J. Marcone, Appellant

(EDPA D.C. No. 98 cr-00544 (RRM)

Present: Mansmann, **Greenberg** [17] and McKee, Circuit Judges

1) Appellant's Pro Se Motion to file Supplemental Appendix

2) Appellee's Response to Appellant's Motion to File Supplemental Appendix.

*LenoreR. Benoit*

Lenore B. Benoit 597 4495 Court Crier/Brief Specialist

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ENTERED JANUARY 13, 2000

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17 On the original, a check appears in this position designating the author was Judge Greenberg..

On January 13, 2000, a second Order was filed by Judge Greenberg which contains his holographic notes as follows:

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

December 21, 1999

No. 99-1842

UNITED STATES OF AMERICA

v.

FRANK J. MARCONE, Appellant

(EDPA D.C. NO. 98-cr-00544 (RRM))

Present: MANSMANN, GREENBERG and MCKEE, Circuit Judges

1) Appellant's Pro Se Motion to File Supplemental Appendix
2) Appellee's Response t Appellant's Motion to File Supplemental Appendix

*Lenore R. Benoit*

Lenore R. Benoit 587 4495
Court Crier/Brief Specialist

Submitted 12/16/99

ORDER

The foregoing *Motion is granted except xx as to the items on*

*page 8, the Savell note, page 11, the Argis memorandum, and pages 12 and 13, the Bechtelheimer memorandum, As to those items, it is denied. Neither the delivery of the materials to the court before the trial nor mere reference to them at trial makes them part of the record.*

By the Court,

*Morton I. Greenberg*

Circuit Judge

Dated: **JAN 13 2000**

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA
NUMBER 99-1842

v.

FRANK MARCONE APPEAL FROM A JUDGMENT OF CONVICTION FILED IN CASE NO.98CR544-1 IN THE EASTERN DISTRICT COURT OF PENNSYLVANIA ON OCTOBER 6, 1999

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APPELLANT'S MOTION FOR APPEAL BAIL
and
MOTION FOR AN EXPEDITED APPEAL

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FACTS:

On October 8, 1998, the Appellant was charged with late filing of three 1040 tax returns for 1990, 1991 and 1992. For purposes of trial, the case was specially assigned to the Honorable Roderick R. McKelvie sitting in Wilmington Delaware.

The Appellant pleaded not guilty and the issues were tried in a bench trial which concluded on. On March 5, 1999 Judge McKelvie entered an Order finding the Appellant guilty of each of three counts.

The Appellant filed various Post Trial Motions pursuant to Rule 33. On October 6, 1999, after dismissing all Post Trial Motions, the Court sentenced the Appellant to four months incarceration, four months of house arrest followed by one year of supervised release. There was no fine nor restitution imposed. The defendant was directed to pay $1,938.25 in costs and a $75.00 assessment. An Order

imposing that sentence was filed on October 12, 1999. The Appellant filed an Appeal to the Third Circuit on October 8, 1999 and thereafter filed a Request for Appeal Bail. On October 21, 1999, Judge McKelvie denied appeal bail. The Appellant now files this Motion for Appeal Bail and a Motion for an Expedited Appeal.

The Appellant has been directed to surrender to the Institution designated by the Bureau of Prisons before 2:00 P.M. on November 4, 1999.

ISSUES:

1. Has the Appellant overcome the presumption against bail pending appeal in the Bail Reform Act of 1984.

2. Does the Appellant qualify for appeal bail because if he serves a four month sentence even an expedited appeal will moot the issues.

DISCUSSION;

The Appellant is 63 years of age and is an attorney by profession. From the Order of the Court dated October 21, 1999, (A copy is attached hereto and is marked Exhibit "A".) it appears there is no question that the Appellant does not pose a threat of flight, nor is he a danger to the community. Further, the District Court has not found this Appeal is taken for purposes of delay.

The only issue before This Court is whether the issues raised in the Appeal satisfy the standards as defined in United States v. Miller, 753 F.2 19, 22,(3rd Cir.1985) and then whether This Court should grant the Appellant's Motion for Expedited Appeal.

ISSUE NUMBER ONE:

Has the Appellant satisfied the standard defined in United States v. Miller (supra) thereby overcoming the presumption against bail pending appeal in

the Bail Reform Act of 1984. Further, does the imposition of a sentence which will be mooted without appeal bail, under the circumstances in this case, warrant the granting of Appeal Bail.

A. Issues Raised on Appeal:

1. The prosecution engaged in prosecutorial misconduct by subpoenaing the appellant's psychiatrist to testify before the grand jury without notice to the appellant, without a waiver of patient/psychiatrist privilege, not for purposes of advancing a legitimate inquiry into taxes since the psychiatrist had never discussed the tax issue but for the specific purpose of having the psychiatrist disclose confidential discussions with the appellant related to his suspension from the practice of law and thereby prejudice the grand jury. Such inappropriate prosecutorial misconduct required the Indictment be dismissed.

The District Court erred in not Quashing the Indictment on the basis that the prosecutor presented testimony from the appellant's psychiatrist to the inquiring grand jury. That testimony was in violation of the patient/psychiatrist privilege, was irrelevant to a legitimate inquiry related to failure to timely file and purposefully and prejudicially was designed to prejudice the grand jurors by revealing the appellant had been suspended from practice after being accused of theft. The prosecutor knew this information was incorrect and misleading yet did nothing to correct the false impression. Further, the testimony was not revealed to the appellant until almost one month after the deadline for filing pre-trial Motions. The government withheld notifying the appellant of the offending testimony and thereby prevented the appellant from complying with the requirements of Rule 12(b)(2). Rule 12(f) as well as

substantial case law provides there may be no waiver of the issue for cause shown. The fact the government intentionally withheld information which prevented the appellant from complying with Rule 12(b)(2) would constitute sufficient reason to activate the provisions of Rule 12 (f). Further, the prejudicial testimony resulting from the prosecutorial misconduct was grossly prejudicial and violated the appellant's constitutionally guaranteed right to fundamental fairness, requiring the prohibitions of Rule 12(b)(2) be ignored.

This issue, if decided in favor of the appellant would terminate the prosecution as a result of dismissal of the Indictment.

2. The District Court erred in concluding the Government had presented evidence which satisfied the Court the Appellant had "willfully failed to timely file his taxes" beyond a reasonable doubt.

At the conclusion of the testimony, the District Court invited counsel to comment on the evidence. After comments by both the Government as well as Appellant's counsel, the Court drew the following conclusions:

> "The testimony shows a number of things...They showed he made an effort, made some efforts to take those steps necessary to see that returns would be filed, gathering information, had communications, went back and forth. That may be the type of efforts that we would characterize as negligent or insufficient, but they are evidence to show some intent, some intent to carry it out. ( notes of testimony P. 182)...document 3-21 the 92 summary, I

think is one of the most significant documents, because it tends to show a little bit of everything about what is going on in the case. Which is a legitimate effort by Marcone to gather information and to submit it to somebody...."

Line 25: So I don't see the dance with Savell as being a charade and

I don't see it- - I don't see what went on with Savell as evidence of evil intent by the defendant. I do see it as confirming a pattern of what appears to be irresponsible or negligent behavior on his part in terms of attempting to meet his duty..."

Page 184: "He made some efforts to try to meet his obligations. He didn't appear to be defiant in failing to meet his obligations, defiant in the sense of I am not going to do it, you know, I am not going to do it. But they also show an apparent inability to carry through on what his obligations are.

Page 185: What we have is a pattern of facts of a person who appears to be disorganized, could be recalcitrant, but doesn't appear to be - - may well be unstable, but in this context, unable, apparently unable to come up with sufficient facts to show he was incompetent and lacked mental capacity on his part to carry through on which his obligations are."

"Did he form an intent not to file the returns

> - and was it willful?
> Which comes down I think in the end, what we are going to talk about is sort of community expectations about it....So then, the question is, if we have a pattern of facts that show some effort by the defendant to meet his obligation, are those facts sufficient to rebut a conclusion of willful intent?...so that says, now, what does the law tell us about a pattern of facts like that in terms of our expectations for individuals in the community? I would conclude the community would say, in that context, those facts are sufficient to show willful intent not to file the tax returns.

(Thereafter, the Court expressed a desire to examine case law where in a similar set of facts, the defendant had been found not guilty. This will be discussed in a following issue.)

The case law clearly is contrary to the conclusions drawn by the Trial Court in the closing comments and the evaluation made of the evidence. Clearly, once the fact finder has decided the Government had presented evidence which convinced the fact finder the defendant's actions were negligent, the Government has not carried the burden of proof beyond a reasonable doubt and the defendant must be acquitted.

This Court has stated that even stubborn, obstinate and perverse failure to pay income taxes on time, ...with a careless disregard...or with gross negligence, do not constitute factors...which are self sufficient to establish willfulness. United States v. Palermo, 259 F.2d 872 (3rd Cir.

1958). As early as 1957, This Court approved jury instructions which stated:

> "As it is used in this statute...it means voluntary, purposeful, deliberate, and intentional as *distinguished from accidental, inadvertent, or negligent. Mere negligence or carelessness, even gross negligence, is not sufficient to constitute willfulness.* This is ...a criminal proceeding, and the word 'willful' as used in this statute means an act done with a bad purpose or one done without justifiable excuse, or one done stubbornly, obstinately, perversely, or with a bad motive."
>
> United States v. Litman, 246 F.2d 206 (3rd. Cir.1957).

Negligence, even gross negligence is not sufficient to establish willfulness. United States v. Goichman, 407 F. Supp.980 (E.D.Pa.1976). Willful as used in the tax statutes means purposeful, deliberate, and intentional as distinguished from accidental, inadvertent or negligence. Mere negligence, even gross negligence is not sufficient to establish willfulness. United States v. Greenlee, 517 F.2d 899 (3rd Cir. 1975)

To prove willfulness in a criminal tax case, the government must show that the law imposed a duty on the defendant, that the defendant knew of this duty and that he voluntarily and intentionally violated that duty. United States v. Moses, 148 F.3d 277 (3rd Cir. 1998).

Justice Blackmun, in United States v. Bishop, 412 U.S. 346, 361, 93 S.Ct. 2008, 2017, 36 L.Ed. 2d 941 (1973)

said: "the Court's consistent interpretation of the word 'willfully' to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well meaning, but easily confused, mass of taxpayers.

In 1982, This Court examined a civil assessment wherein a 50% fraud penalty had been applied after the taxpayer had failed to file tax returns. In Raley v.C.I.R. 676 F.2d 980, (3rd Cir. 1982), this Court found a showing of willful failure to file without demonstrating the intent to meet the clear and convincing standard is insufficient.

In Raley, (supra), Raley had pleaded guilty to a willful failure to file his returns. After he was assessed under the civil penalty, This Court reversed the assessment stating the failure to file tax returns is not enough to satisfy the proof requirement of civil liability. To assess even a civil penalty, the government must prove by clear and convincing evidence that the taxpayer intended to commit fraud.

In 1966, in United States v. Vitiello, 363 F.2d 240, (3rd Cir. 1966) citing to Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418, This Court said:

> "Instructions which define an act as willful when done 'without ground for believing it is lawful, or when marked by careless disregard whether or not one has the right to act have been rejected by this court as improper dissolutions of the scienter required by section 7203...Our affirmative statements of the meaning of 'willfulness' in section 7203...clearly exclude any type of carelessness or negligence, however inexcusable....mere laxity, careless disregard of the duty imposed by law, or

even gross negligence, unattended by 'evil motive' are not probative of 'willfulness'".

Therefore, the defendant has raised an issue which appears to clearly define a misapplication of the law by the Trial Court. If the Appellant is correct and the law requires more than "negligence" beyond a reasonable doubt, the factual conclusions made by the Trial Judge require This Court enter an Order of Judgement of Acquittal.

3. If Trial Counsel failed to interview and prepare the Appellant's Psychiatrist in expectation of trial, did that failure constitute a claim of ineffective assistance of counsel requiring the verdict be vacated and a new trial ordered.

Prior to trial, Trial Counsel disclosed his intention of calling Dr. Paul Jay Fink, M.D. to the stand for the purposes of testifying to the medical findings resulting from his collaboration with three other medical doctors who diagnosed the Appellant as suffering from an ischemia.

Dr. Fink was never summoned nor did he testify. After trial, the Appellant returned to Dr. Fink who is also a Psychiatrist. It was only then that the Appellant learned Trial Counsel had not contacted Dr. Fink in preparation for trial and had never interviewed him to determine what Dr. Fink would have testified to.

Dr. Fink has supplied the Appellant with an Affidavit which is attached hereto. Further, the Appellant has supplied an Affidavit related to his recollection of the circumstances surrounding pre-trial preparation of Dr. Fink.

The Trial Court refused to take testimony on the issue and there is no post trial record in which a finding was made. The request for such a hearing was promptly made especially in consideration of a careful reading of This

Court's Opinion in United States v. Kauffman, 109 F.3d 186 (3rd Cir. 1997). In that case, the failure by trial counsel, prior to the entry of a plea of guilty, to interview a psychiatrist who had diagnosed Kauffman manic, was clear ineffective assistance of counsel. In that case, the 3rd Circuit remanded the case for a hearing on the issues to determine the facts surrounding the failure to prepare completely. After a fact hearing was held and relief denied, the 3rd Circuit reviewed the findings and reversed, concluding trial counsel's failure to investigate or research the insanity issue at all resulted in a cursory uninformed judgement call which deprived Kauffman of the meaningful representation which the Constitution requires. This evidence was crucial in providing an affirmative defense to the crime, and casting doubt on the government's case with respect to Kauffman's criminal intent.

In this case, had Dr. Fink confirmed the belief held by the Appellant that extending himself in both overwork or stress might result in a stroke, could have convinced the Court that the requisite intent had not been proven beyond a reasonable doubt. In fact the Trial Judge referred to this possible defense when, in his concluding remarks, he stated:

> "And at the conferences before the trial, we talked about issues of competence and the defendant's mental state. I understand a lot of these facts maybe really do shed light on his competence and mental state. But I understand that he is not making an affirmative defense of lack of capacity to form the intent....the pattern of facts...show an apparent inability on his part to carry through on what his obligations are...What we have is

> a pattern of facts of a person who appears to be disorganized, could be recalcitrant, but doesn't appear to be---may well be unstable, but in this context, unable, apparently unable to come up with sufficient facts to show that he was incompetent and lacked the mental capacity."
>
> (Emphasis provided.)

It appears clear that had Dr. Fink been interviewed and testified, the testimony may have been enough to prove the "sufficient facts to show he was incompetent and lacked the mental capacity."

Therefore, under the Kauffman (supra) standard, it is clear even the current state of the record, without the necessity for a time consuming fact hearing at the trial level, that the verdict must be vacated and a new trial awarded.

4. After trial IRS conceded their audit of 1990 through 1992 (the years in which the appellant had been indicted.) revealed the appellant had overpaid his 1990 tax liability by $4775.00 which then they conceded prepaid 1991, leaving a credit for 1992. This constituted newly discovered evidence requiring a new trial be awarded.

In August, 1999, six months after the verdict, IRS auditors sent the appellant a notice conceding the appellant had overpaid his liability for 1990 by $4775. That amount was credited to his alleged 1991 liability, which satisfied any amount allegedly owed for that year. The balance was then applied to 1992. This changed the entire structure of a defense for the government had argued the appellant's motive for not timely filing was to avoid a levy for the amount allegedly owed. Once they conceded there was nothing owed, this "motive" disappeared. Therefore, since

the amount alleged to be owed constituted the only government motive theory, the government's theory of scienter also "disappeared", thereby changing the entire prosecution and hence changing the entire defense, therefore requiring a new trial.

The appellant could not have discovered the change in the accounting made by the government in August, 1999, prior to trial. This alone requires a new trial.

5. After trial the appellant discovered documents he did not know existed. They were documents prepared by Thomas Reardon, the deceased accountant. They revealed the testimony of Joseph Bowers, Reardon's employer, was in error. The documents were shown to Bowers who thereupon recognized his error and he gave the appellant an affidavit admitting his trial testimony was incorrect. That testimony provided the only alleged "overt" act in the trial. Bowers had testified he had prepared tax returns and gave them to the appellant for 1987 and 1988. There were no returns filed in those years. After reviewing the evidence, Bowers realized his employee, Reardon, had been assigned the task of preparing the returns, that they may not have been prepared due to Reardon's then undisclosed illness and the testimony given at trial was wrong.

This alone should have resulted in the verdict being vacated and the new trial granted.

6. The District Court promised that if the appellant found a case similar in facts where the defendant had been found not guilty, the appellant would be found not guilty. The appellant presented the Court with the case under the presentation of newly discovered evidence. The Trial Court stated it was not newly discovered evidence.

At the conclusion of the trial, the Court requested the appellant research and present to the Court a case, similar in facts, where the defendant was acquitted. The appellant hired a law professor from Hofstra Law School to locate such a case. None was located. In September, 1999, the appellant personally located the case of Government of Virgin Islands v. Allen, 251 F.Supp.479 (1966) where, on a similar set of facts during a bench trial, Allen was found to be "grossly negligent" and the trial judge observed Allen had not been charged with "gross negligence". He had been charged, as was the appellant, with willful failure to timely file his returns for three years, and the trial court was "compelled" to find Allen not guilty.

Finding the case and presenting it to the Court should have resulted in a change of the verdict to not guilty. Review will result in either remand for findings consistent with the case or a judgement of acquittal by the Circuit Court.

7. The appellant presented evidence after trial which was a diagnosis of Attention Deficit Disorder (ADD) and was newly discovered which presented a defense of incapacity to form the requisite criminal intent. The Court said it was not "newly discovered" since the appellant could have learned of it before trial.

After trial, the appellant was told he was possibly suffering Attention Deficit Disorder. He pursued the suggestion, was diagnosed and presented evidence that the condition would impact upon his ability to participate in preparation of his tax returns, and would also impact upon evidence of his capacity to form the requisite criminal intent. The Court dismissed this post trial Motion claiming the appellant could have discovered his condition prior to trial.

If the 3rd Circuit finds this diagnosis was "newly discovered" evidence, a new trial must be ordered.

8. The evidence presented at sentencing required the Court sentence the appellant to no more than a six month probationary sentence.

Judge McKelvie sentenced the appellant at a guideline standard of 11. This calculation was based upon an alleged tax liability exceeding $70,000. Prior to sentencing, the government conceded the appellant had prepaid his 1990 and 1991 taxes. At sentencing the appellant presented evidence through an accountant who showed there was no tax liability for the years 1990 through 1992 and in fact the appellant had a tax credit as a result of improper seizures during those years. The government has not even attempted to contradict that testimony. The Court nonetheless sentenced the appellant at level 11. The appropriate level should have been 5 which would have required a six month probationary sentence only. The Court did not impose a fine nor restitution.

The sentence therefore was incorrectly calculated and requires remand for a strictly probationary sentence.

There may be other issues but the ones cited above certainly fall within the requisite issues which, if decided in favor of the appellant would result in either a new trial or a judgment of acquittal.

LENGTH OF SENTENCE:

One of the criteria examined by courts, in determining whether appeal bail should be given, aside from the above listed criteria discussed in Untied States v. Miller (supra), is the factor that a short sentence of confinement will be mooted by failing to grant bail.

In Landano v. Rafferty, 970 F.2d 1230 (3rd Cir. 1992), the

Third Circuit reviewed a Petition for Bail in a State Habeas proceeding. In such cases the criteria for review requires the factual predicate for the exercise of review must be "extraordinary circumstances". In reviewing what constitutes "extraordinary circumstances", the Court looked to the 5th Circuit case of Boyer v. City of Orlando, 40 F.2d 966 (5th Cir. 1968) where appeal bail was awarded simply because the sentence was so short that if bail was denied the sentence would have mooted the punishment issue.

In United States v. Kopp, 951 F.2d 521 (3rd Cir. 1991), the district court sentenced the defendant to eleven months but admitted that if the defendant prevailed on his appeal of the sentence issue, an eight month sentence would be appropriate. In that case, the district court entered an order that if the Appellate procedure was not completed within eight months, bail should be permitted for the remainder of the sentence. The Third Circuit granted bail.

In United States v. Fisher, 871 F.2d 444 (3rd Cir. 1989), an immediate appeal was permitted because otherwise the right to bail would become moot if incarceration occurred during an appeal.

Without reviewing all the issues, it appears the law requires appeal bail since the defendant clearly would have no reason to flee, that he is neither a danger to himself or the community, that the appeal is not being taken for the purposes of delay, especially since the defendant expects to move for an expedited appeal process. The remaining issue before the Court is whether the questions being proposed on appeal would, if decided in favor of the defendant, either result in a judgment of acquittal or a new trial.

Further, after trial but before verdict, the Court acknowledged the issues were of such a nature that an appeal was likely and the Third Circuit would be deciding the issues before

the Trial Court.

Further, the appellant is the only person responsible for the well being of his 90 year old mother and an aunt and uncle who are in a nursing home in Florida. He has no siblings nor cousins. On October 18, 1999, the appellant was informed the nursing home in which his relatives are being cared for has lost its' license and he must re-locate them before November 30, 1999. This will require the appellant to travel to Florida, locate another institution, arrange for the transfer and since all three relatives are suffering from dementia, he must personally participate in moving them. This was unexpected and together with assisting counsel with this appeal, winding up his practice, dealing with disciplinary matters and attempting to arrange for the welfare of his family while he is incarcerated, there is no reason why incarceration during appeal must occur.

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EXPEDITED APPEAL:

The appellant respectfully requests the Court enter an Order, expediting this Appeal and in support thereof, avers the following:

1. The appellant is an attorney and is admitted to practice before both the United States Federal District Court for the Eastern District of Pennsylvania as well as the Third Circuit Court of Appeals.

2. The appellant is 63 years of age and was suspended from practice before the Pennsylvania Supreme Court on October 11, 1989 for a four year period. The appellant filed Motions asserting he had been ill and unable to defend the charges due to a loss of memory from the illness. His memory had been restored prior to the date of suspension and the appellant averred the complainant had lied. On July 19, 1990, the Pennsylvania Supreme Court vacated the four year suspension and reinstated the appellant. The Court also Ordered the disciplinary hearings

resume for the purposes of taking additional testimony. During those hearings, the appellant convinced the hearing committee the complainant had lied. In an extremely unusual outcome however, the Pennsylvania Supreme Court reinstated the remaining balance of the four year suspension in July, 1995. That suspension terminated on September 28, 1998. As a result of the termination of that suspension, the appellant was able to have his license to practice before the Eastern District Court. The appellant has not been suspended by This Court, although there is a current issue related to the prior suspension and the accusation in this case.

3. The Indictment in this case was filed on October 8, 1998 and has resulted in the defendant being unable to practice fully in the Federal Courts and also has prevented him from proceeding to have his license to practice in the Pennsylvania Courts restored. Further, he is even unable to make an application for admission to other jurisdictions.

4. Pursuant to the Rules of Attorney Discipline in all courts, a conviction places a serious question of jeopardy upon the appellant's professional license. He currently has many clients who he represents before both Federal Courts.

5. Expediting this appeal will permit the issues to be resolved promptly and will afford protection to both the appellant as well as his clients. Should the appeal be decided in his favor, his license to practice law will not be affected. If it is not, he and his clients will be enabled to intelligently determine what direction to take related to further legal matters.

6. If the appellant were to begin serving his sentence, an automatic expedited appeal would occur and the appellant simply requests this appeal be expedited without necessity for incarceration.

7. All the notes of testimony, including the sentencing, have been transcribed and there would be no delay in preparing and filing the appellate brief nor in argument.

WHEREFORE, the appellant respectfully moves the Court to direct his appeal be expedited and that the appellant be released on appeal bail during any appeal procedure and until further Order of the Court.

Respectfully submitted,

_____

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## APPELLANT'S ANSWER TO THE GOVERNMENT'S RESPONSE TO THE APPELLANT'S MOTIONS FOR BAIL PENDING APPEAL AND FOR EXPEDITED APPEAL IN 98-544 (E.D. PA.)

The appellant, Frank Marcone has moved for bail pending appeal as well as an Expedited Appeal. The Government has conceded they do not oppose the request for Expedited Appeal.

This is an appeal from a misdemeanor conviction for untimely filed tax returns from 1990 through 1992. The charge was an act of ommission rather than an act of commission. The four month sentence imposed would be substantially served before this appeal is completed.

FACTS: The appellant was tried for failing to timely file three tax returns in 1990 through 1992. The returns have been filed for years and the government concedes when filed, the appellant actually reported more income than an IRS audit found. Further the evidence would show that during 1990, the appellant was suffering from a physical illness; that he filed an extension in April, 1990 together with a $5,000 payment and in July, 1990, he voluntarily paid over $20,000 to IRS as a result of an improper levy on his account. In 1991, the appellant paid IRS an additional $13,000 as a result of a second improper assessment and then hired an accountant in January, 1991, giving him a power of attorney to file his 1040 returns as well as to resolve the improper seizures and claim a refund. The appellant provided substantial information to the accountant related to the seizures and at trial, the accountant admitted the information was found in his files by IRS but that he had never addressed the issues of the refund. The accountant further testified that he was unable to prepare the 1990 and

1991 returns for the appellant without first determining how to account for the IRS seizures in 1990 and 1991.

In June, 1991, the appellant had written to the accountant urging him to begin preparing the late returns. The accountant was on vacation and did not call the appellant upon his return. The appellant again wrote to the accountant resulting in a meeting at the appellant's home to begin reviewing the records. No return was prepared for 1991.

In April, 1992, the accountant sent the appellant a blank extension, requesting the appellant sign and file it. The appellant refused and insisted the accountant estimate what the appellant owed from the records given the accountant. As a result of that demand, the accountant estimated the appellant owed $11,000.00. The appellant prepared an extension and sent a check for $11,000 to IRS on April 15, 1992. Since the accountant had not resolved the seizures, he prepared no return for 1991.

In early April, 1993, the appellant sent the accountant a letter summarizing his earnings, expenses and data necessary to compete a tax return. The appellant requested a return be prepared so the appellant could comply with his filing obligations. No return was filed. The accountant's records disclose calls from the appellant early on April 14, 1993 and thereafter.

In 1994, IRS agent Jacobs contacted the appellant inquiring as to the late filed returns. The appellant referred agent Jacobs to his accountant. Both the records of the accountant as well as agent Jacobs reveal the accountant was contacted and promised to prepare returns within two weeks. The accountant never prepared any returns.

Agent Jacobs referred the case to CID and in October 8, 1998, the Grand Jury indicted the appellant.

In March, 1999, after a bench trial before the Honorable Roderick R. McKelvie, sitting specially in the matter, Judge McKelvie stated the evidence convinced him the appellant had been "negligent, disorgainized, not recalcitrant, not defiant, had attempted to comply by

gathering information and submitting it to somebody" and then the Court stated that the findings however may not overcome a "presumption of willfulness". The Court then gave the appellant two weeks to find a case similar in facts where the defendant had been acquitted. Prior counsel was unable to locate such a case and the appellant was acquitted after two weeks transpired.

ISSUES RELATED TO APPEAL BAIL:

The Government also concedes the appellant does not pose a threat of flight, is not a danger to himself or the community and obviously, since he has moved for an Expedited Appeal, he is not seeking Bail pending the appeal for a delay purpose.

The remaining issue distillates to the determination by this Court whether the appellant has raised issues on appeal which would, if decided in his favor, result in a reversal or an order for a new trial. United States v. Miller, 753 F.2d 19, 24 (3rd Cir. 1985), United States v. Messerlian, 793 F.2d 94, (3rd. Cir.1986).

Marcone has raised substantial issues which alone should result in a reversal of the verdict. He has also separately raised issues which alone require This Court direct the verdict be set aside and a new trial be granted.

Furher, as the Government concedes on page two under the heading of "II THE LEGAL STANDARD", bail must be granted where the sentence is in question and if the question were resolved in favor of the appellant;"imprisonment less than the sum of time served."

The issues which should result in a reversal of the verdict also are directed to the heart of the prosecution. The issue related to prosecutorial misconduct before the Grand Jury clearly requires the Indictment be dismissed.

THERE ARE SUBSTANTIAL ISSUES OF LAW AND FACT REQUIRING BAIL BE GRANTED

A. The Prosecutorial Misconduct before the Grand Jury:

The government did not notify the appellant nor his counsel that it subpoened Dr. Paul J. Fink , M.D., the appellant's psychiatrist to testify before the Grand Jury. His testimony was clearly presented in violation of Federal Rules of Evidence 501 and the clear definition of patient/psychiatrist privilege as defined by the United States Supreme Court in Jaffe v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337(1996), cited by This Court in Grand Jury, In re, 103 F.3d 1140 (3rd Cir. 1997).

ALLEGATION OF A RELEASE:

The Government's response raises an issue of a "release" of medical records which was submitted in April, 1997, when the appellant proffered a reason for his inability to timely file his tax returns. That release was for "medical records" and was for an assertion of a physical illness, not for a psychotic disorder. If the government depends upon the "release" it must be strictly construed by the Court and further it does not purport to waive any privilege especially testimonial.

WAIVER OF CLAIM OF PROSECUTORIAL MISCONDUCT:

The Government concedes they subpoened Dr. Fink, the appellant's psychiatrist to testify before the grand jury. The appellant was arraigned in late October, 1998 and his pre-trial Motions were due ten days thereafter. Pre-trail Motions were filed but at the time neither the appellant, nor his counsel knew Dr. Fink had testified at Grand Jury. That fact was not disclosed until early December, 1998, at least twenty days after the deadline for Pre-trial Motions. Prior counsel has submitted an affidavit admitting to ineffectiveness for not recognizing the issue.

The Government attempts to evade being called to task by attempting to hide behind the provisions of Rule of Criminal Procedure 12 (b)(2). Careful reading of both the Rule and the comments following the Rule, as well as Rule

12 f and case interpretation from the United States Supreme Court down to District Courts defeat this attempt to evade the result of the proscutor's misconduct.

As cited on page 4 of the Government's Response, Rule 12 (b) states: "any defense...which is capable of determination without the trial of the general issue may be raised before trial by motion..."(Emphasis provided.)

Further the Rule continues on that a defect in the indictment must be raised prior to trial however, the appellant is not raising an issue of a technical argument related to a "defect in the indictment". The issue being raised is one of both fundamental fairness and prejudice to the appellant and it is clear when those issues are raised, the verdict does not "resolve" the issue.

Also, without referring to the comments following Rule 12, the Government also concedes Rule 12(f) states the failure to raise defenses or objections ...shall constitute a waiver thereof, but the court for cause shown may grant relief from the waiver." (Emphasis provided.)

The appellant avers aside from the admitted ineffectiveness of prior counsel, the Government's failure to notify the appellant of it's intention to seek privileged testimony from the psychiatrist coupled with the fact the Government failed to give notice of the violation until over 20 days past the pre-trial filing deadline had passed, give more than "cause shown" as referred to in Rule 12 (f).

Also, the Comments following Rule 12 clearly define the present Motion to Quash or Dismiss the Indictment based upon prosecutorial misconduct, are not waived if not filed prior to trial. In the Comments following the Rule, (Note to Subdivision (b)(1)and (2)), the commentators state "these two paragraphs classify into two groups all objections and defenses to be interposed by motion prescribed by Rule 12(a). In group one are defenses and objections which must be raised by motion, failure to do so constituting a waiver. In the other group are defenses which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver..."

In the second group which are raised at the defendant's option, are "all defenses and objections which are capable of determination without a trial of the general issue...Such matters have been heretofore raised by demurs, special pleas in bar and motions to quash.".

Clearly, there is no "waiver" as is claimed by the Government and Rule 12 f, the comments following the Rule, careful reading of the Rule itself referring to "may" rather than "shall" require any "waiver" argument to be ignored.

Further, the Government purposefully withheld notice of the evidentiary violation and did not disclose the testimony occurred until long after the deadline imposed upon the appellant for filing pre trial motions.

Rule 12 (f) requires that if a "waiver" exists, it must be set aside for the good cause shown.

Giving further credence to the application of Rule 12(f) is the affidavit on record whereby trial counsel admitted to ineffectiveness in failing to observe and raise the issue of Quashing the Indictment prior to trial.

Also, the appellant is able to point clearly to the prejudice which resulted from the prosecutorial misconduct. The testimony of the psychiatrist had no legitimate purpose. The IRS agents has violated the patient/psychiatrist privilege when they interviewed the psychiatrist in 1997. While that violation was not disclosed until December, 1998, it did produce a notation that the psychiatrist had never discussed the appellant's tax problems.

His testimony therefore was known to the Government to be devoid of any legitimate reason to call him to testify. Once before the Grand Jury, the prosecutor pressed the psychiatrist to detail the discussions which the appellant and the psychiatrist had related to the fact the appellant had been suspended from the practice of law. The psychiatrist told the grand jurors that the appellant had told him the appellant had been accused of taking someone's money and as a result was suspended by "local, state and federal courts". To a layman it was clear the government

had presented evidence that the appellant had been found guilty in three separate courts and suspended from practice as a result of the convictions.

One must only look at the decision in United States v. Breslin, 916 F. Supp. 439, (E.D.Pa) 1996, wherein Judge Shapiro found when the prosecutors told the grand jurors one of the targets of their inquiry had been investigated by a public television station, that revelation was so prejudicial as to require the Indictment be dismissed. Reciting the applicable law, Judge Shapiro said if there is a showing of actual prejudice or if there is grave doubt that the decision to indict was free from substantial influence of such violations the Indictment must be dismissed.

Further, the appellant is not complaining of a "technical" violation such as occurred in United States v. Mechanik, 475 U.S.66, 70(1986), where the complaint was that there were two witnesses in the grand jury room at the same time. The Court said when the complaint was "technical" then the petit jury's verdict mooted the issue. If however the issue is one wherein the appellant, as here, claims a violation of his right to "fundamental fairness" and is able to point to possible prejudice, the issue survives a petit jury finding. This Court has spoken on this issue in United States v. Fisher, 871 F.2d.444, (3rd Cir.1989) wherein, citing from a 10th Circuit case, United States v. Taylor, 798 F.2d 1337, 1340 (10th Cir. 1986), and decided that when the appellant raises issues addressed to "fundamental fairness" of the criminal proceeding, those issues "remain justiciable afer final judgment."

Clearly the Government's suggested waiver is not supported by either the facts or the law. The continuous reference to a "mental" illness was not involved in the 1997 presentation. The issue was limited to the presence of an ischemia which is a constricted blood vessel in the appellant's brain. It was discovered in 1990 and if the appellant is overcome with stress or overwork, he could suffer a stroke. There was no assertion the appellant was suffering from a psychosis and therefore was going to claim

Dr. Fink would testify to a mental illness. Even if such an assertion would have been made, any waiver under Rule 501 would have required a specific statement and at minimum, notice of the intention of the Government to call the prohibited witness.

Further, if the appellant is correct and the testimony before the Grand Jury is deemed either prejudicial or raises "grave doubt" the decision to indict was influenced by the prosecutorial misconduct, then the Indictment must be dismissed.

To allege this does not raise an issue which satisfies the question that the issue raises "fairly debatable issues" and are "close" as is referred to by This Court in the following language in United States v. Messerlian, 793 F.2d 94 (3rd Cir. 1986):

> "We do no more than decide that within the meaning of 18 U.S.C.§3143(b), as construed in *Miller*[18] and *Smith*[19],the issues which Messerlian will raise on appeal are sufficiently substantial to satisfy the requirements of that statute. Under *Smith* and *Handy*[20], they are 'fairly debatable', Under *Giancola*[21], theyare 'close' questions of law."

B. THE EVIDENCE WAS INSUFFICIENT TO SATISFY A COURT THAT THE GOVERNMENT HAD OVERCOME A PRESUMPTION OF INNOCENCE AND THERE WAS NO REASONABLE DOUBT OF GUILT.

In this case, the appellant has cited case law which clearly exempts "negligent" acts from criminality in the

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[18]United States v. Miller, 753 F.2d 19 (3rd Cir. 1985)

[19]United States v. Smith, 793 F.2d 85 (3rd Cir.1986)

[20]United States v. Handy, 761 F.2d 841281-82(9th Cir. 1985)

[21]United States v. Giancola, 754 F.2d 898 (11th Cir. 1985)

charges involved herein. The language of the Trial Court following the completion of testimony clearly establishes that the Court concluded the Government had not overcome a presumption of innocence beyond a reasonable doubt. The language of the Court not only evidenced a factual conclusion there was "reasonable doubt" for the Court found the evidence only satisfied the fact finder the appellant had been negligent, disorganized, not recalcitrant nor defiant. The fact finder also concluded the appellant had clearly made an "effort" to comply with the law and by all case law, the Court should have concluded the defendant was not guilty.

It is interesting to note the total absence of the phrases, "presumption of innocence" and "reasonable doubt" in the language of the Trial Court. It is clear the Trial Court not only misapplied the legal criteria the requires the Government prove guilt beyond a reasonable doubt and also by proof which would rise above negligence, or even "gross negligence" Here, Judge McKelvie concluded the evidence had convinced him the appellant was at most "negligent". Applying traditional jury instructions, the Court should have next concluded the Government had not presented proof beyond a reasonable doubt. Instead the Court said they were applying a standard which was described as "a presumption of willfulness." Such a presumption simply does not exist and certainly had no place in this case. Once Judge McKelvie concluded the evidence had only convinced him of negligence he was bound by law to enter a verdict of not guilty.

In this case, the issue, if decided in favor of the appellant would result in a judgment of acquittal.

C. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT INTERVIEWING AND THEN PRESENTING DR. FINK AS A WITNESS.

This issue, if decided in favor of the appellant would result in a new trial. After the trial, the appellant discovered his trial counsel had not discussed the prospective testimony

with the doctor. The testimony was two fold. Dr. Fink, in his capacity as a medical doctor, had assisted three other physicians in locating the physical defect known as the ischemia. He had been the primary physician and had instructed the appellant to curtail stress and overwork or risk a stroke. The appellant wanted to present Dr. Fink to verify the instructions for it was the appellant's fear of a stroke which prevented him from directing anger at his accountant and undertaking to procure another person to prepare his tax returns. During 1990, the appellant was subjected to intense stress. He was faced with the resumed disciplinary hearings. He was forced to begin another practice for his extensive practice had to be abandoned when he was suspended in 1989. That suspension was vacated in 1990 and the appellant had to start his practice from "scratch". ( He did rebuild it only to lose it again in 1995 when the suspension was reimposed when the Disciplinary Board concluded that even though the appellant was falsely accused, he had not proven it by "after discovered evidence".)

During 1990, the appellant, who had no siblings, was faced with his father's decimating illness requiring the physical presence of the appellant. The appellant was required to decide to terminate his father's life support at Christmas in 1991 and in January, 1992, his father died. A month later, the appellant's mother had a stroke and she became entirely dependent upon him. The appellant would have testified to this stress.

Dr. Fink had given an affidavit stating neither defense counsel contacted him. Mr. Fioravanti claims he recalls a conversation as does the appellant. The appellant was present in Mr. Fioravanti's office in April, 1997, when, returning from the proffer with the government, Mr. Fioravanti called Dr. Fink to tell him the IRS agents would be coming to procure the physical medical records of the appellant. The issue before the grand jury was for treatment sought by the appellant and which was unrelated to the years in question. The inquiry procured information related to the 1995 suspension and the depression which followed

that. The proffer related to the ischemia which had been diagnosed in 1990, five years earlier.

The District Court was urged to hold a hearing on the issue and resolve the issue as is defined in United States v. Kauffman, 109 F,3d 186 (3rd Cir. 1997), however the Court did not comply. The record however contains affidavits from both Dr. Fink as well as the appellant. To force this back for purposes of an evidentiary hearing would be patently unfair under the circumstances since new counsel may raise ineffectiveness on a direct appeal.

If this issue is successful, the verdict must be set aside and a new trial ordered.

D. IN AUGUST, 1999, OVER FIVE MONTHS AFTER THE VERDICT, IRS INFORMED THE DEFENDANT THEIR CALCULATIONS CONCLUDED HE HAD OVERPAID HIS TAXES IN 1990 BY $4,775.00 WHICH WAS THEN APPLIED TO 1991 TAX LIABILITY WHICH OVERPAID THAT YEAR ALSO. THE APPELLANT ALLEGES THIS ADMISSION CHANGED THE ENTIRE STRUCTURE OF THE DEFENSE AND SHOULD RESULT IN AN ACQUITTAL

The Government argues the accounting should be ignored since it resulted from a credit given from a "suspense" account which had been created prior to 1990 and 1991. While this may be true, if the appellant had evidence which gave credibility to his claim that he had prepaid his taxes for 1990 and 1991, his defense would have changed and the issue, if believed could have resulted in an acquittal.

In March, 1991, the appellant had written an eight page letter to his accountant which concluded that the government owed him over $37,000 in refunds. That amount would have clearly overpaid the 1990 through 1992 taxes. This state of mind whereby the appellant, contemporaneously with the imposition of the liability of tax reporting was claiming he was owed a refund would clearly conflict with the government's theory of guilt. The prosecutor argued to the Court that the appellant only paid

when he had to and also that he purposefully late filed simply to avoid collection.

If the evidence conceded the prepayment had occurred and the appellant was correct in asking his accountant to file for a refund, then his alleged purposeful late filing would make no sense. He would want to file to procure his refund.

When the government admitted he was correct and that he had overpaid, this gave credence to the belief of the appellant and was evidence of the lack of intent.

If this issue is decided in favor of the appellant, the verdict must be set aside and a new trial granted.

E. THE TRIAL TESTIMONY OF ACCOUNTANT BOWERS WAS NOT ONLY MATERIAL BUT PROVIDED THE ONLY "OVERT" ACT WHICH COULD HAVE BEEN CONSTRUED AS EVIDENCE OF INTENT.

Accountant Bowers was the employer of Thomas Reardon, the man assigned to do the bookkeeping and tax reporting for 1987 through 1989. Mr. Reardon kept his terminal illness secret and he died long before trial. He had been given full access to all the appellant's records and had the responsibility of preparing the tax returns. He did prepare some of the returns but much like accountant Savell, he filed extensions instead of dealing with the work.

Joseph Bowers testified that his recollection was that he had serviced the account and had prepared returns which he gave to the appellant sometime in 1987 through 1989. Clearly no returns had been filed and the conclusion rationally reached was that he had given returns to the appellant who had then purposefully not filed them on time.

After trial, while the appellant was searching for accounting records to show he had been subject to an improper seizure, he located an old file in a desk used by one of his secretaries. The office had been closed since 1995 and the desk was in storage. The appellant did not know the file existed before finding it. It contained some of the work done by Reardon in 1987 and 1988. Once these documents were

displayed to Bowers, after trial, he admitted his testimony was in error and that he had testified not from an actual recollection but from a recitation of his office procedure. Further, Matthew Hanna, Esquire affirmed that in 1987 though 1989 he was in charge of the appellant's office and that Reardon was given all the records. Further the transmittal of any returns would have been through him. He never saw any returns prepared by Reardon other than the 941 returns which were filed and paid.

This evidence was the only evidence of an overt act and was not only material but if eliminated, would result in a new trial and possibly an independent finding of innocence.

F. THE ALLEN CASE ACQUITS THE APPELLANT AND WAS NOT FOUND AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL. IT WAS DISCOVERED AFTER THE TRIAL AND QUALIFIED AS AFTER DISCOVERED EVIDENCE.

At the conclusion of the testimony, Judge McKelvie expressed his desire to examine a case which was similar in facts to the appellant's case. He stated he was interested in facts and not in the law for he had the law given to him in Briefs. He gave the defense two weeks to find such a case.

The appellant hired a Law Professor at Hofstra solely for the purposes of assisting his trial counsel in finding such a case. The effort proved unsuccessful.

In July, 1999, after the appellant began taking medication for ADD, he was able to address this issue personally. He found in Government of the Virgin Islands v. Allen, 21 F. Supp.479 (D.V.I 1966) which was a bench trial decision where, under a similar set of facts, the court had concluded Allen was "grossly negligent". The court then stated that since he was charged with late filing of his tax returns, gross negligence was insufficient to sustain a guilty verdict and the trial judge was "compelled" to find Allen not guilty.

Since Judge McKelvie said he had the law and only wanted a case similar in facts, the appellant asserts this was newly discovered evidence and should have been considered and resulted in a judgment of acquittal. Even if it does not however, it then lends itself to a claim of ineffective assistance of counsel or evidence of innocence simply under the law.

If finding and presenting the case in the two week period after trial would have resulted in a verdict of not guilty, justice and fair play as well as due process declare the verdict should be not guilty in July if the verdict would have been not guilty in March.

G. THE COURT ERRED IN FAILING TO GRANT A NEW TRIAL ON NEWLY DISCOVERED EVIDENCE OF ATTENTION DEFICIT DISORDER.

On the day of sentencing, the appellant presented testimony from Judith Donnelly a psychologist who specializes in Attention Deficit Disorder. She testified that if the appellant knew he suffered from the disorder, it would have provided the appellant with a defense to his ability to form the requisite criminal intent. This seemed to impress the Trial Court and a recess was declared. After a short period of time the Court reconvened and while the testimony may have been enough to grant a new trial, the Court then concluded the evidence was not "newly discovered" since the appellant could have discovered it prior to trial.

Dr. Donnelly had testified the disorder is physical and is newly recognized, having been first defined scientifically approximately 20 years ago. The disorder was believed to be confined to children until only a few years ago when it was discovered the illness did not dissipate with adulthood. In fact what occurred is that sufferers of the disorder had unconsciously learned to "mask" the disorder by appearing to adjust to"normal"activities. This "masking" made the disorder difficult to detect and certainly not one readily known to laymen.

The appellant testified that he had learned of his

disorder while standing in front of the United States Courthouse in Philadelphia. He was awaiting his new lawyer and while standing across the street, he was approached by David Firtche, Esquire who is an Assistant United States Attorney. Mr. Fritche had been an assistant District Attorney in Delaware County and had known the appellant for years.

In the ensuing conversation between the appellant and Mr. Fritche, Mr. Fritche disclosed he had heard of the conviction and asked the appellant what plans he had to present at sentencing. Mr. Fritche disclosed his son is suffering from a brain disorder and he and his wife have read extensively in the area of disorders. He suggested that the appellant was ADD. The appellant was not familiar with ADD and believed it was a learning disorder. Mr. Fritche suggested that the appellant should procure a treatise on the disorder for Mr. Fritche's opinion was that reading one was like reading the appellants biography.

The appellant was impressed enough to seek information. He then contacted his psychiatrist and soon thereafter was placed on medication which "slowed" the brain patterns, permitting a certain degree of normality. The appellant had never known of the illness nor did he even understand his childhood manners would have led to a diagnosis.

The Court wants to hold the appellant to the requirement that he would have been able to discover the illness before trial.

This Court will review this finding de novo. United States v. Pellulo, 14 F.3d.881 (3rd Cir. 1994) and the inquiry will be was the evidence available through an exercise of due diligence prior to trial.

The testimony showed the illness is relatively new to the medical profession. The Trial Court imposes upon the appellant an expertise to learn of new medical advances and then to diagnose an illness which is "masked" by the adoption of what appear to be "normal" reactions to stimuli. This is not and should never be a standard for "due diligence" and certainly, if This Court decides the Trial Court

imposed to great an obligation upon the appellant, a new trial must be ordered.

The law states newly discovered evidence is: "(a) evidence must be in fact, newly discovered, i.e. discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied upon must not be merely cumulative or impeaching' (d) it must be material to the issues involved' and (e) it must be such, and of such a nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

H. THE COURT APPLIED THE WRONG GUIDELINE IN IMPOSING A SENTENCE AND THE APPELLANT AT MOST MUST BE SENTENCED TO PROBATION.

The Guidelines calculation requires the Court first determine the averred tax loss.

In this case, the Government admitted their records disclosed the appellant had no tax liability for 1990 and 1991. The evidence the Government attempts to ask This Court to ignore is a Notice from IRS, made part of the record notifying the appellant their records showed he overpaid his taxes for 1990, before they were due. The overpayment was then credited to his 1991 taxes which overpaid them. There was a "break" in the government's theory of tax liability by their own admission .

At the hearing on the day of sentencing, the appellant presented unrebuked testimony and a supporting affidavit from a CPA, Attorney, ex-IRS agent who verified there was no tax liability as a result of a second reason. In 1990 the IRS had assessed the appellant for 941 tax liabilities when in fact he had no employees and he had also closed his office due to his illness. That over assessment was part of the 1990 and 1991 seizure and was in excess of $30,000.00.

Without any tax liability, the guidelines would declare the appellant should have been sentenced at a level five (5) which requires he be sentenced to six months probation. The trial court did not impose either a fine or restitution but only directed the appellant to work out what

he allegedly owes for 1990 through 1991 with IRS. The Court should not have imposed a sentence without first determining exactly how much tax liability existed. Since the appellant presented evidence which was unrebuked, then the sentence must not exceed a six month probationary sentence.

The averments of the Government related to other years are immaterial to this issue. The Court must declare there was a specific finding of a tax loss for the indicted years and the Government has the burden of proof. The Government simply did not even attempt to prove what they knew they could not prove. They attempted to go on a stipulation that referred to only what the tax returns reported as owed. The appellant proved that he had prepaid those returns and he had no tax liability.

The efforts to demean the appellant by referring to failure to file in other years is inappropriate for the Government is aware there are no findings of the Trial Court which accept these accusations as proof of anything. The Trial Court specifically denied any restitution.

I THE GOVERNMENT HAS NOT ADDRESSED THE SEPARATE ISSUE THAT BAIL MUST BE GRANTED WHEN IT APPEARS THE SENTENCE WILL BE COMPLETELY SERVED DURING THE APPEAL PROCESS.

This issue was extensively briefed in the Motion for Appeal Bail and has not been responded to. The appellant therefore moves the Court to accept as unchallenged the proposition that the length of the sentence standing alone in this case requires appeal bail be granted.

Respectfully submitted

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Stephen P. Patrizio, Esquire